

# CENTRALISED LEGISLATION

*A History of the Legislative System of  
British India from 1834 to 1861*

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ASIA PUBLISHING HOUSE

BOMBAY • CALCUTTA • NEW DELHI • MADRAS  
LUCKNOW • LONDON • NEW YORK

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TO MY FATHER  
VIDWAN SRINIVASA DESIKACHARYA

PRINTED IN INDIA  
AT THE UNIVERSITY PRESS, UNIVERSITY OF DELHI, DELHI-6,  
AND PUBLISHED BY P. S. JAYASINGHE,  
ASIA PUBLISHING HOUSE, BOMBAY-1.

## C O N T E N T S

<i>Foreword</i>	vii
<i>Preface</i>	xiii
I. Legislative System before 1834	1
II. Legislative System, 1834-61	26
III. Legislative Council at Work	94
IV. The Law Commissions at Work	167
V. Control over Legislation by the Authorities in England	226
VI. Survey of Legislation, 1834-61	270
VII. End of the Period of Centralised Legislation and its Significance	322
VIII. Bibliography	336
<i>Index</i>	347

## FOREWORD

Modern Indian administration has been built up by stages and the nineteenth century contributed largely to raise the present structure. There are certain distinctive features in it which may be specified as unity of legal system, uniformity of judicial processes, subordination and accountability of executive machinery to the legislative, and representation of public opinion in the constitution of the legislative bodies. Despite seeming diversity between the component States of the Indian Union, there prevails a certain similarity of administrative experience which is characteristic of centralised governments and is the expression of fundamental oneness of the people and their desire to live as one integrity even in the face of linguistic and other divisive factors. Cultural unity, historical association, economic self-interest and political vicissitudes may have conditioned the evolution towards such a culmination. But when in the eighteenth century the transformation of the British East India Company from a trading corporation into a political governing sovereign authority began, the experiment in India did not assume a monolithic form. The realities of the situation prompted independent, almost rivalistic, emergence of governmental organisation and loci of command at the three centres. It is true that the supreme authority was one and indivisible, but its location was in England. In India, however, its manifestation found a triple reflection not because of any insurmountable divergences in the make-up of the governed, but owing to the bureaucratic jealousies and craving for freedom from any immediate control of the governors. Fondness for approbation from their masters and keenness for adventurous expansionism, unfettered by any nearer restraints, made the Company's servants in Madras and Bombay averse to the contemplation of a central authority in India. For long the employers beyond the seas were also not prepared to relinquish their authority and supreme control, even by an iota, and that prevented the setting up of any central authority in India to which powers could be delegated. This fortuitous



development of three political organisations, each independent of the other, though owing common allegiance to one supreme authority in England, reacted on the sentiments, loyalties and political awareness of the people as well. In the governmental sphere even when strategic and diplomatic considerations compelled united action and subordination to one political authority in the country here, the old prejudices were powerful enough to bar the application of centralised control in the administrative, judicial and legislative fields. All expressions of supreme authority were resented, resisted and even stoutly opposed. The Government in England also did not grow conscious of the implications of localism and decentralism and often lent its ignorant support to the ebullitions of autonomous local supremacy. And as people imbibed the culture and notions of their rulers, they developed a sense of local patriotism and fortified the will of the "Presidential" officialdom to cling to their autonomy and fight for it in the name of the peculiar culture of their subjects and their uniqueness from the rest of the country. What emerged was a plethora of local laws, diverse forms of judicial machinery, obstructive tariff walls and complex systems of taxation and land revenue. The country was thus divided within itself despite its traditional unity and cultural, social or religious uniformity, and a legal system was evolving which if allowed to continue might have created a permanent cleavage.

It was in this situation that the English nation sought to explode the Company's monopoly of exploitation of Indian resources and compelled the Parliament to throw open the portals of India to all British citizens who might choose to tread upon the Indian soil whether for trade, colonisation or any other occupation. The whole land was to be one preserve for the English immigrants, and they could not be subject to a diversity of laws and judicial systems which might restrict their dynamism. This motivation united with the new compulsions occasioned by the expansion of the British dominion which had absorbed all Indian sovereignties within itself and acquired a new contiguity with foreign countries and competing European imperialisms in Asia. Demands of defence and international communication together with exigencies of finance gave further

momentum to the wheel moving in the direction of centralisation. More compelling a motive perhaps was as years rolled by the growing political consciousness of the people who were fast realising the need for common action all over India to redress their grievances and exert pressure on the government to yield political rights to the people. To the old sociological forces tending towards unity, the new Western learning and the commonness of experience of alien domination were added. The similarity in the expression of feelings of revolt or political agitation which had stemmed from the same basic evil, namely the exploitative system of foreign rule, also compelled unity of legislative and administrative approach to crush outbursts of intractability before they attained serious dimensions. The Act of 1833 legislated for the establishment of a full-statured central authority in India, over-riding all local autonomy, superintending, guiding and controlling the Presidential or Provincial administrations which exercised only delegated authority, and possessing full and sole power to make laws, raise finances and govern the country. Essentially the Central or Supreme Government had the monopoly of legislative power, and all other authorities were subject to it and were deprived of their law-making functions. For nearly thirty years wholly and about a century thereafter virtually the Central Government continued to wield this weapon of legislative supremacy, which was inevitable in the absence of the growth of any form of responsibility to the people in the country.

Prior to 1833 all law-making was the privilege, and in the sole competence, of the executive machinery. Its actual output was given the title of Regulations and these could not have any better significance than the orders issued by the governing bodies for the regulation of the administrative system and for controlling and channelling the conduct and behaviour of the people. The Act of 1833 did not fundamentally alter the situation beyond concentrating this function within the orbit of the Supreme Government at Calcutta and limiting the competence of the Presidency Governments in this direction. All that was done then was to draw a distinction between the legislative and executive functions of the Governor General and his Council and introduce one more member into it whenever

the Council busied itself with the former. This separateness of the two processes of government, even to the extent of distinctness in personnel, has led constitution writers to trace the beginnings of legislature in India from the date when the Fourth or the Legal Member of the Council assumed his seat. Dr. Desika Char has not unjustifiably been led to regard such a Council as the parent of Parliamentary institutions in India. And the paraphernalia of legislation which was now associated with law-making, placing emphasis on "due deliberation" and "wide consultation", even to the extent of eliciting public opinion on the proposed laws and styling the finished products as Acts, certainly lent the appearance of a legislative body to the Governor General's Council when its Fourth Member took his seat there. What is remarkable, however, is not the form of the Council but the will and preparedness to associate public opinion, howsoever indirectly and impersonally, in the framing of legislation. Of course, at that early stage, except in exceptional circumstances, such public opinion was largely the European opinion and that too of the metropolitan towns; but with the emergence and growing sturdiness of the Indian Press and the practice of submitting petitions and memorials by the landlords and other higher elements of the Indian society, including the new educated community as time advanced, state legislation, particularly social legislation, ceased to be widely distant from the sentiments and demands of the politically conscious section of the people. The changes made by the Act of 1853 in the composition and powers of the Legislature or the Governor General's Council when it assumed the role of law-making and its public sittings brought into relief this aspect of Indian legislation—the public began to know what was being done and the legislature became more responsive to public opinion in that process. The new Council with officials all, yet posing to be representative, made itself inconvenient to the executive, specially as it began to appropriate the functions of a Parliament so as to make the Government responsible to it in its executive functions. And the result was that the new Council was cut prematurely short and, after the Revolt of 1857, and largely owing to it, a new Act was framed in 1861. It apparently altered the character of law-making, but in

essence the legislative function was still centralised. With all the non-officials, including the Indian element in it, and the Provincial Legislatures which were instituted, because of the basic character of government, all legislation, whether Central or Provincial, was regulated from one source and continued to be a mere expression of the will of the executive government, which henceforth retained an official majority and insisted on the official personnel merely echoing the voice of the supreme authority.

An important feature of the 1833 changes was the appointment of a Law Commission to help the legislature in framing laws. The Law Member was to preside over it and it was to include officials noted for their experience in administration. There was neither provision for nor possibility of an Indian being included in it. The first Law Commission busied itself more with wranglings than law-making and its output was unimpressive. After the passing of the Act of 1853, a fresh Law Commission was constituted and it gave to the country various codes which have existed even to the present times. The period of thirty years of centralised legislation was, despite the comparative ineffectiveness of the Law Commission, rich in the crop of legislation. It is true that the Penal and Criminal and Civil Procedure Codes could not come to the anvil till the close of this period, but in a way the framework had been prepared earlier. In most of the laws the spirit of the times is clearly in evidence. Recent historians have attributed this to the powerful development of British liberalism which was then saturated with Benthamite thinking. No doubt many of the Governors and their top official advisers were influenced by Utilitarian ideas, but the general trend of the white bureaucracy in India was still that of parental administration, to regard itself as *Ma-Bap* of the people. Their realism operated to resist the penetration of new-fangled theories originating in different climes; and they believed that they alone knew what was of good to their people. It will be pertinent, however, to examine how far the growing Indian opinion, which was militantly reformist at the time, was responsible for providing the motivation for some of the laws and for infusing certain liberalism into the Penal and other codes, which assumed

a different complexion from the contemporary penal system of England. All social legislation was the result of the demands at the time by the radical Indian elite.

The Revolt of 1857 was no sudden, incoherent explosion of medieval feudalism fighting a rearguard action in the defence of its vested interests which were threatened by a modern liberal government upholding people's rights. The revolt, as is clearly evident from the expressions of public opinion, was the last struggle of the past and the inauguration of the people's fight for their freedom from alien rule which had imposed unresponsive, despotic government and patronised all reactionary institutions. The absence of contact between the rulers and the ruled, and absolute lack of machinery to reflect people's wishes, aspirations, sentiments and feelings in the existing administrative system were assessed as the major motivations for the revolt. It is this fact which prompted the introduction of the Indian element into the deliberations of the Government. The first traces of it are evident in the Indian Councils Act of 1861, which sought a relative reversing of the process of centralisation by constituting Provincial Legislative Councils so as to give greater scope for the representation of Indian opinion. However, bureaucratic illiberalism was too strong to permit any substantial change in the direction of popular representation. The legislatures were to be responsive to public opinion, whenever convenient, but no basic change in the character of government or even the legislatures was contemplated. Apparently decentralisation of legislation, particularly of the local municipal type, was introduced. But not till the people had control over the Government and responsibility was introduced could there be any prospect of real decentralisation.

Dr. Desika Char has discussed the forces operating for centralised legislation and examined the various laws passed at the time. His work, based on official papers which had not come to light before, is a very valuable contribution to the study of this most interesting phase of Anglo-Indian administration.

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## P R E F A C E

The Charter Act of 1833 is a great landmark in the history of legislative institutions in India. Prior to its enactment, the Presidency Governments were more or less independent of each other in legislative matters as in others, and executive and legislative powers were vested in the same hands. The work of legislation was very much neglected, and there was great confusion in the legal and judicial system of the country. With a view to securing the introduction of basic and fundamental reforms on uniform lines throughout the Company's possessions in India, Parliament vested the sole authority for legislation in the Governor General in Council. This was only one of the facets of the highly centralised system of government established under the Act. The Act also added a legal member to the Council for legislative purposes and set up a Law Commission to assist in the codification of laws. With the addition of the Fourth or the "Legal" Member, a legislature distinct from the executive government came into existence, and the Governor General's Council inclusive of this member may be said to be the parent of the Parliamentary institutions in India. In addition to these structural changes, the legislative process underwent a marked change. "Due deliberation" and "wide consultation" were the two cardinal principles of the revised process, and the public were provided with an opportunity to express their views and sentiments in respect of measures under the consideration of the Council. The high expectations of early reform held out in 1833 were, however, not fulfilled, and the legislative arrangements were not adequate for realising the objectives in view. The Charter Act of 1853 further expanded the Governor General's Council for legislative purposes by adding two judges of the Calcutta Supreme Court and one representative nominated by each of the four Local Governments. A second Law Commission was also set up, this time in England, to assist in the work of codification. Its work was highly commendable and this period was really the dawn of the great age of law reform in India. But serious complications

arose in the working of the legislative mechanism. The members of the executive government had lost their predominance in the new Legislative Council, and this enabled the latter to put forward disconcerting claims to independence and power which, if conceded, would have made it in reality "a little Parliament", as it was derisively called. Moreover, since the proceedings of the Council were thrown open to the public and the press, differences in official circles received wide publicity and threatened to undermine the prestige of the Government as a whole. Apart from these difficulties, the three decades following the Charter Act of 1833 witnessed the rise of a class which had the benefit of English education and was imbued with the ideals of freedom and democracy. The activities of this class, the rising of 1857, and the pressure from the highly influential non-official European community made it necessary to take urgent steps to allay public opinion. For meeting this new situation, the Indian Councils Act of 1861 decentralised the legislative function. In addition to the Central Legislature which was to attend to matters of inter-Provincial and all-India concern, it set up Provincial Legislatures to handle questions of local interest. Further, the Legislature ceased to have only official members; not less than one-half of the additional members nominated to the new Councils, both at the Centre and in the Provinces, were to be non-officials, European and Indian. With their inclusion, we have the birth of the representative system in India, and the new ideal before the Government was to have an administration "responsive" to public opinion, without prejudice to its supremacy and authority and its ultimate responsibility to the British Parliament. This system lasted till 1919, when the gradual evolution of responsible government was accepted as the goal of India's constitutional development. This objective was attained in 1947 when the British Government transferred all power and authority concerning the governance of India to the duly elected Constituent Assemblies of India and Pakistan.

The object of the present study is to trace the history of the centralised system of legislation that was in force in British India from 1834 to 1861. A brief, general survey of the laws enacted during the period has been added, because a proper

understanding of the course of legislation is essential for a correct appreciation of the working of the legislative machinery. The period has a unity and an individuality of its own: the Legislature branched off from the Executive and became, politically if not legally an independent organ of Government; the power to enact laws was vested wholly in the Central Government; the Legislature was composed of only official members, but it evinced such a sturdy spirit of independence that later day "representative" Legislatures might well have envied; and public opinion as an important factor in the political and administrative life of the country received constitutional recognition by the publication of legislative measures prior to their enactment and by the admission of the public and the press to witness the proceedings of the Legislature. The study is based on the manuscript records at the National Archives of India, New Delhi, and also the published records and general works available there and in the National Library of India at Calcutta.

I am deeply indebted to Dr. Bisheshwar Prasad, who has guided me in my research. He has been to me much more than a guide and a professor. But for his continuous encouragement, it might not have been possible for me to complete the study amidst my official preoccupations. I must take the occasion to record my sense of gratitude to Shri S. V. Krishnamoorthy Rao, Deputy Speaker, Lok Sabha, and Shri B. S. Kesavan of the National Library of India, Calcutta, for all their help and encouragement. I am much obliged to the Director and staff of the National Archives of India for all their assistance. My grateful thanks are also due to Shri K. Venkataraman of the Council of Scientific and Industrial Research for going through the manuscript and offering many valuable suggestions.

NEW DELHI  
*January 1963*

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CHAPTER I  
LEGISLATIVE SYSTEM BEFORE 1834  
*Mercantile Stage*

IN its early career, when the East India Company was merely a trading concern and did not possess any territory or governmental authority, the only powers of a legislative character it needed were those of making rules and regulations for the management of its internal affairs and to regulate the conduct of its servants. When factories were established in India, it became also necessary to attend to the needs of the local population living within their precincts. The first Charter issued by Queen Elizabeth in 1601 vested the Governor and Company in England with the power "to make, ordain and constitute such and so many reasonable laws, constitutions, orders and ordinances for the good government of the said Company, and of all factors, masters, mariners, and other officers, employed or to be employed in any of the voyages, and for the better advancement of the said trade and traffic", and to "provide such pains, punishments, and penalties by imprisonment of body, or by fines or amerciaments, or by all or any of them" to secure due obedience to the laws. Such laws and penalties were to be "reasonable and not contrary or repugnant to the laws, statutes and customs of this our realm".<sup>1</sup> These powers were similar to the authority commonly exercised at that time by ordinary municipal and commercial corporations in making by-laws.<sup>2</sup> The Charters of 1609 and 1661 contained similar provisions, but the Charter of 1698 was silent on the point. However, the "Judicial Charter" of 1726, which provided for the establishment of corporations and Mayor's Courts at Calcutta, Madras and Bombay, is also of great importance from the legislative angle as it vested for the first time<sup>3</sup> the Company's agents

<sup>1</sup> Courtenay Ilbert, *The Government of India* (Oxford, 1898), p. 464.

<sup>2</sup> *Ibid.*, p. 10.

<sup>3</sup> A. B. Keith refers to certain earlier cases wherein legislative authority may be, perhaps, considered to have been exercised; but he concludes that there is "no evidence of any serious claim to possess legislative authority proper" prior to 1726. *A Constitutional History of India, 1600-1936* (London, 1937), pp. 42-3.

in India with legislative powers. It empowered the Governors and Councils at these settlements to make laws "for the good government and regulation of the several corporations hereby created, and of the inhabitants of the several towns, places and factories aforesaid respectively and to impose reasonable pains and penalties on all persons offending against the same or any of them". Such laws and penalties were to be reasonable and in conformity with the laws of England,<sup>4</sup> and were to come into effect only when they had been approved and confirmed by the written orders of the Court of Directors. The Charter of 1753 contained similar provisions.

The Mughal Government and other Indian Princes were also not opposed to the exercise of such powers by the Company. Beginning with the mission of Sir Thomas Roe, they permitted the Company to regulate its internal affairs, and settle disputes among its servants, according to the English law and practice. Where the local inhabitants were parties, all disputes and justiciable cases were to be referred to the officers and courts of the Government concerned. In course of time, however, the Company's servants came to exercise certain judicial and other powers over the local inhabitants by virtue of the *zamindari* rights conferred by the Indian Princes or in exercise of the *de facto* authority acquired by the the Company following the gradual disintegration of the Mughal Empire. But the expediency and legality of these powers were often in doubt, and there was a long-drawn dispute over the question between the Governor in Council and the Mayor's Court at Bombay. To settle the controversy and clear doubts, the Charter of 1753 laid down that the Mayor's Courts should have no jurisdiction over civil disputes among the local inhabitants, unless both the parties to a suit agreed to submit to their jurisdiction. However, in practice, it was difficult to give effect to this provision owing to the absence of established courts representing the Government of

<sup>4</sup> The insistence on conformity with the laws of England was due to the Charter being "principally designed for the government and benefit of Europeans". Charles Fawcett, *The First Century of British Justice in India* (Oxford, 1934), p. 224.

the country to adjudicate and settle such disputes.<sup>5</sup>

On the whole, during the mercantile period, the legislative and judicial powers exercised by the Company's agents in India did not amount to much. In permitting them to exercise these powers, the British Crown had evinced no intention to acquire territorial dominion in India,<sup>6</sup> nor had the Indian Princes parted with any portion of their sovereign authority.

*Acquisition of Territory and the Evolution of the Legislative System up to 1834*

The victory at Plassey in 1757 and the acquisition of the *Diwani* of the provinces of Bengal, Bihar and Orissa, conferred by the Mughal Emperor in 1765, started the East India Company on its great career as a territorial ruler. The powers granted by the earlier Charters, insufficient even for its mercantile needs,<sup>7</sup> were hardly adequate to enable it to cope with the altered situation. Its servants, however, proceeded with their work of administration, making laws and dispensing justice, without waiting to know if they had legal authority to do so. For instance, in its instructions of 1769 to the Supervisors, the Government at Fort William made laws for the people of Bengal "not through legislature, but through their servants, the Supervisors, who acted as judges and were guided by the principles of equity".<sup>8</sup> Again, the well-known Regulations of 1772 by which Warren Hastings brought to an end the double government instituted by Clive were not based on any legal powers conferred by the British Parliament.

Before long, the fabulous wealth acquired by the servants of the Company and the stories of the cruelty and oppression practised by them attracted the attention of Parliament to the new situation that had arisen, and the enquiries which followed led to the passing of the Regulating Act of 1773. The main evils complained of were in respect of the *Diwani*

<sup>5</sup> *Ibid.*, pp. 218-26.

<sup>6</sup> Herbert Cowell, *History and Constitution of the Courts and Legislative Authorities in India* (Calcutta, 1936), p. 17.

<sup>7</sup> *Ibid.*, p. 19.

<sup>8</sup> Bijoy Kisor Acharyya, *Codification in British India* (Calcutta, 1914), p. 51.

territories of Bengal, Bihar and Orissa, which were *de jure* parts of the Mughal Empire. Under the existing political and other circumstances Parliament was hesitant to legislate directly for these territories. All that it sought to do was to provide checks against abuse of power by the Company and its servants and by other Englishmen going to India. The principal means adopted for the purpose was to set up a Supreme Court at Calcutta under a Royal Charter, wholly independent of the Company, and hence in a position to act as an effective check on its servants. It was vested with civil, criminal, equity, ecclesiastical and admiralty jurisdictions. In addition to being a court of record,oyer and terminer, and gaol delivery for Calcutta and the factory of Fort William, it could entertain suits against British-born subjects, in the service of the Company or otherwise, in the provinces of Bengal, Bihar and Orissa, and against all persons in their employment, directly or indirectly. It could entertain suits against the local inhabitants of these provinces in respect of contracts entered into with British-born subjects where the cause of action exceeded Rs. 500 and it had been specified in the contract that the Court should have jurisdiction. The Court could entertain no suits against them except in such cases. Provision was also made for appeal to the Privy Council, both in civil and criminal cases.<sup>9</sup> As the statute was silent regarding the law to be administered, it was presumed that English law should be applied. By these arrangements the jurisdiction of the Supreme Court extended not only over Calcutta, which had come to be regarded as British territory, but also over the activities of the Company's servants and of all British-born subjects in the *Divani* territories of the three provinces which were administered *de jure* on behalf of the Mughal Emperor. The Governor General and the members of his Council, who were mainly responsible for the administration of the country, had only one safeguard; they could not be arrested or imprisoned by the authority of the Court, or indicted before

<sup>9</sup> 13 Geo. III, c. 63, ss. 13-14 & 16. Letters Patent establishing a Supreme Court of Judicature at Fort William in Bengal, dated 26 March 1774.

it for any offence, except that of treason or felony.<sup>10</sup>

Of greater importance, however, to the present study are the legislative provisions of the Regulating Act. On the lines of the Charter of 1753, the Governor General of Bengal in Council was empowered to make Regulations "for the good order and civil government of the said United Company's settlement at Fort William aforesaid, and other factories and places subordinate, or to be subordinate thereto, as shall be deemed just and reasonable (such rules, ordinances and regulations, not being repugnant to the laws of the realm), and to set, impose, inflict and levy, reasonable fines and forfeitures for the breach or non-observance of such rules, ordinances and regulations". In place of the prior approval of the Court of Directors hitherto required before the Regulations came into force, it was now provided that they should be registered in the Supreme Court with its "consent and approbation". Provision was also made for an appeal against the Regulations, thus enacted and brought into force, to the King in Council in England, who could set them aside.<sup>11</sup> This power to make Regulations did not extend to the newly acquired *Diwani* territories.<sup>12</sup>

The distribution of power between the Government at Fort William and the Supreme Court effected by the judicial and legislative provisions of the Regulating Act was most ill-conceived, and the law was vague in many respects. The Parliament's main object in enacting the measure was to impose an effective check on abuse and oppression by the Company's servants in Bengal, and this was, indeed, highly laudable. The setting up of an independent Royal court was also a step in the right direction. The root of the mischief, however, lay in the legislative provisions of the Act. The legislative competence of the Governor General of Bengal in Council was very much circumscribed by the provision that the Regulations issued by him should be "reasonable and not repugnant to the laws of England".<sup>13</sup> The general and sweeping

<sup>10</sup> 13 Geo. III, c. 63, ss. 15 & 17.

<sup>11</sup> *Ibid.*, ss. 36-7.

<sup>12</sup> See note 22 below.

<sup>13</sup> See note 46 below for the highly restrictive character of the provision.

character of the restriction placed the Supreme Court, acting strictly in its judicial capacity, in a vantage position. The dangers inherent in the provision were further enhanced by the Act being silent as to the law to be administered by the Court. In the absence of a definite provision protecting the laws and customs of the local inhabitants, there was room for the presumption that English law should be administered,<sup>14</sup> and this law the Bengal Government was not competent to modify to suit the circumstances of the country. In addition to the extensive powers which the Supreme Court possessed in its strictly judicial capacity, it had also a general power of veto over all legislation. It could, as the Regulating Act came to be interpreted, entertain petitions from the public against registration of measures submitted for the purpose by the Government, and decide upon their expediency as well as their legality.<sup>15</sup> By these arrangements the Supreme Court emerged all powerful, and the Government of Bengal was left with very inadequate powers to shoulder the burden and responsibility of administration. The situation in Bengal, however, required strong government, and the events which followed the enactment of the Regulating Act led to a virtual breakdown of the constitutional machinery.

The difficulties experienced in the working of the Regulating Act and the constitutional impasse that developed led

<sup>14</sup> Warren Hastings and others petitioned to Parliament against the wholesale introduction of English law into the country by this means, and H. Cowell has expressed the view that the provision did have this effect. *History and Constitution of the Courts and Legislative Authorities in India* (Calcutta, 1936), pp. 42-3, 56 & 59. Subsequent events show that there was a real danger of English law becoming the *lex loci* of all the Company's territories, as it did in fact in the Presidency towns, if the Act of 1781 (21 Geo. III, c. 70) had not been passed. But G.-C. Rankin has done well in pointing out that contemporary expressions of opinion on the subject are not free from exaggeration: "As regards the civil law at least, there is no reason to attribute to Impey and his colleagues any intention to depart from the general principles which the Mayor's Court had theretofore applied to the ordinary affairs of life in Calcutta. It is not shown that they were minded to disregard native customs as to marriage or succession." *Background to Indian Law* (Cambridge, 1946), p. 8.

<sup>15</sup> See Chapter II, note 65, below.

to further Parliamentary enquiries, and 21 Geo. III, c. 70, was enacted in 1781 to meet the situation. This measure did not seek to provide a well-defined integrated plan of administration,<sup>16</sup> but, in the typically British way, confined itself to the solution of the actual difficulties which were experienced. Since the interventions of the Supreme Court had proved to be highly embarrassing to the Government in the administration of the newly acquired territories, its jurisdiction was strictly confined to Calcutta and to British-born subjects, whether living within that town or in the "mofussil", a term most commonly used in the technical jargon of the time to signify the whole of the areas subject to the Government of a Presidency, excepting the Presidency town itself. The judicial and legislative provisions of the Regulating Act continued to be in force in their case, and the only change made referred to the Hindus and Muslims. Suits against the inhabitants of Calcutta bearing on "inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party", it was laid down, should be determined in the case of the Hindus and the Muslims by their respective laws and usages, and where only one of the parties was a Hindu or a Muslim, by the laws and usages of the community of the defendant. It was also provided that in the case of these communities the authority of fathers and masters of families should be preserved, and their actions should not be adjudged crimes even though they infringed the laws of England, provided they were in accordance with the rules and customs of their castes. The Supreme Court was empowered to make rules and issue orders governing adjudication of suits, civil and criminal, against Indians so as to "accommodate the same to the religion and manners of such natives, so far as the same may consist with the due execution of the laws and attainment of justice"; but such rules and orders were subject to the "approbation, correction or refusal" of His Majesty in

<sup>16</sup> Hastings and Barwell put forward a plan for instituting an integrated system of courts and of a legislature composed of both the members of the Fort William Council and the judges of the Supreme Court, but it was not accepted. For the text of the plan, see G. W. Forrest (Ed.), *Warren Hastings*, Vol. II (Oxford, 1910), Appendix C.

Council.<sup>17</sup> The judicial and legislative systems thus evolved in respect of Calcutta were extended later to the Presidency towns of Madras and Bombay. A Recorder's Court was set up at each of these places in 1797,<sup>18</sup> and it was replaced by a Supreme Court in Madras in 1800,<sup>19</sup> and in Bombay in 1823.<sup>20</sup> The provisions in respect of legislation were extended to them in 1807.<sup>21</sup>

The position of the areas outside Calcutta had been very anomalous under the Regulating Act. While the Supreme Court at Calcutta was given undefined and extensive powers of control over the actions of the Company's servants administering these areas, it was far from clear if the Act conferred any legislative authority on the Government of Bengal in respect of the same areas. In any case, Warren Hastings and his Council appear to have relied for the validity of the Regulations made by them, after the passing of the Regulating Act as in the period prior to it, on the grant of the *Diwani* by the Mughal Emperor in respect of civil matters and on the expressed or implied consent of the Nawab of Murshidabad in respect of the *Nizamat* or criminal matters. The well-known Regulations of 1781 reforming the judicial system of the mofussil areas were promulgated without being registered in the Supreme Court.<sup>22</sup> In providing for their administration,

<sup>17</sup> 21 Geo. III, c. 70, ss. 17-20. It was clearly not the intention of Parliament, as observed by Rankin, to limit the benefit of personal laws only to the Hindus and the Muslims. The Supreme Courts of all the three Presidencies, however, interpreted the provisions strictly and did not extend them by analogy to other communities. G.C. Rankin, *Background to Indian Law* (Cambridge, 1946), p. 12.

<sup>18</sup> 37 Geo. III, c. 142, s. 9.

<sup>19</sup> 39 & 40 Geo. III, c. 79, s. 2.

<sup>20</sup> 4 Geo. IV, c. 71, s. 7.

<sup>21</sup> 47 Geo. III, c. 68, ss. 1-2.

<sup>22</sup> A. B. Keith, *A Constitutional History of India, 1600-1936* (London, 1937), p. 90; C. Ilbert, *The Government of India* (Oxford, 1898), p. 46; and Harrington's *Analysis* (London, 1821), Vol. I, p. 8. Cowell seems to take a contrary view with regard to the Regulations of 1781. The Regulating Act, he observes, was taken to apply only to Calcutta and its dependent factories, and not to what the Act described the territorial acquisitions of Bengal, Bihar and Orissa. "But the Act does not appear to have been so understood, and the large body of regulation law mentioned above [Regulations of 1781] was framed in pursuance of its powers for the benefit of the provinces." *History and Constitution of the Courts and Legislative Authorities in India* (Calcutta, 1936), pp. 66-7.



Parliament went back on the policy of the Regulating Act, and the Statute of 1781 freed the administration of the mofussil from the control of the Supreme Court. This court was to have no jurisdiction in any matter concerning the revenue or over any person on account of his being a land-owner or farmer of land.<sup>23</sup> It was to entertain no action for wrong or injury against the judicial officers of the Company's Courts arising out of their judicial decisions. Where any corrupt act was alleged against them, such officers were to be given adequate time and opportunity to appear before the Supreme Court and explain their case.<sup>24</sup> The Governor General and the members of his Council were declared jointly and severally exempt from the jurisdiction of the Supreme Court in respect of their public acts. Persons other than British-born subjects impleaded before it for acts performed by them under the orders of the Government could plead the general issue.<sup>25</sup> The Statute also accorded recognition to the judicial system that had been evolved outside the Presidency town. It declared the Governor General in Council to be a court of record with appellate jurisdiction over the Provincial Courts in civil causes and allowed an appeal to the King in Council in England in suits of the value of £ 5,000 (Rs. 50,000) and over. Further, it was given jurisdiction in respect of all offences committed in collecting revenue, but punishment was not to extend "to death, or maiming, or perpetual imprisonment".<sup>26</sup> There was no reference to the *Faujdari* or criminal courts, because they were *de jure* subject to the authority of the Nawab and not the Company. As regards legislation, the authority of the Governor General in Council "to frame Regulations for the Provincial Courts and Councils" was recognised. The veto of the Supreme Court did not extend to these Regulations, but that court was not also bound to enforce them unless they were registered with it.<sup>27</sup> They came into effect as soon as

<sup>23</sup> 21 Geo. III, c. 70, ss. 8-9.

<sup>24</sup> *Ibid.*, ss. 24-6.

<sup>25</sup> *Ibid.*, ss. 1-3.

<sup>26</sup> *Ibid.*, ss. 21-2.

<sup>27</sup> There was some doubt as to whether this was the correct legal position, but this was made clear by the Statute of 1797. See C. Ilbert, *The Government of India* (Oxford, 1898), p. 62; also C. D. Dharkar, *Lord Macaulay's Legislative Minutes* (Oxford, 1946), p. 9.

they were passed by the Governor General and his Council. Copies were, however, to be sent to the Court of Directors and one of His Majesty's Principal Secretaries of State, and His Majesty in Council could disallow or amend them within two years.<sup>28</sup>

The legislative authority conferred by the Statute of 1781 in respect of the mofussil areas of the Bengal Presidency was free from the restriction applicable to the laws enforceable by the Supreme Court—that the Regulations should be reasonable and not repugnant to the laws of England. This gave the Government a free hand to make laws suitable to Indian conditions. But the authority that had been conferred was not a general one. The Government was empowered by it only “to frame Regulations for the Provincial Courts and Councils”. This was hardly adequate. As a result, when Lord Cornwallis promulgated his famous code of 1793 covering many matters, he had to depend for the validity of a number of his laws upon the authority derived from the Mughal Emperor or other local authorities, in the same manner as Warren Hastings had done in his time.<sup>29</sup> In 1797, Parliament gave *ex post facto* sanction to what Lord Cornwallis had done by an indirect reference to his reforms. It prescribed, “All Regulations which shall be issued and framed by the Governor General in Council at Fort William in Bengal, affecting the rights, persons, or property of the natives, or of any other individuals who may be amenable to the Provincial Courts of Justice, shall be registered in the Judicial Department, and formed into a regular code, and printed, with translations, in the country languages, and that the grounds of each Regulation shall be prefixed to it; and all the Provincial Courts of Judicature shall be, and they are hereby directed to be, bound by and to regulate their decisions by such rules and ordinances

<sup>28</sup> 21 Geo. III, c. 70, s. 23.

<sup>29</sup> Minute by Marquis of Cornwallis, 1 December 1790. Cited by F. L. Beaufort, *A Digest of the Criminal Law of the Presidency of Fort William and Guide to All Criminal Authorities therein* (Calcutta, 1850), pp. 9-10. Also, see H. Cowell, *History and Constitution of the Courts and Legislative Authorities in India* (Calcutta, 1936), p. 68; and A.B. Keith, *A Constitutional History of India, 1600-1936* (London, 1937), pp. 125-6.

as shall be contained in the said Regulations".<sup>30</sup>

These provisions of the Statutes of 1781 and 1797 were the main sources of legislative authority as derived from Parliament in respect of the mofussil areas up to the passing of the Charter Act of 1833. The Government had no power under them to alter the revenues or impose new taxes. It had to depend for these purposes on its inherent power as a government, whether it was "derived in succession to the native authority from the grant of the *Dewanny*, or from those Statutes by which the general power of government or of ordering the revenues had been given or continued to the Company".<sup>31</sup> The system of legislation evolved in Bengal in respect of the mofussil areas was adopted by Bombay<sup>32</sup> in 1799 and the same was extended to Madras<sup>33</sup> in 1800. Thus, by 1800, there was a uniform system of legislation in respect of the mofussil areas, and, by 1807, in respect of the Presidency towns also as mentioned earlier.

Subsequent enactments of Parliament removed doubts and supplied lacunae in certain important respects. In 1807 it was made clear that the Governments at the three Presidencies were competent, with the prior sanction of the Court of Directors and the Board of Control, to establish public banks at the Presidency towns with such powers as were usually conferred on corporations in England.<sup>34</sup> By the Charter Act of 1813, they could, with similar prior sanction of the authorities in England, impose duties of customs and other taxes in respect of all places and persons within the jurisdiction of the King's Courts, and also make laws and

<sup>30</sup> 37 Geo. III, c. 142, s. 8. The wordings were almost literally taken from Bengal Reg. XLI of 1793.

<sup>31</sup> H. Cowell, *History and Constitution of the Courts and Legislative Authorities in India* (Calcutta, 1936), p. 73. The Charter Act of 1813 recognised the existence of this power by alluding to it: 53 Geo. III, c. 155, ss. 98-9.

<sup>32</sup> The Government of Bombay started issuing Regulations relying on 37 Geo. III, c. 142, s. 11. As this action was found to be not really warranted by law, Parliament gave the necessary authority by 47 Geo. III, c. 68, s. 3. See Preamble to Bombay Reg. II of 1808.

<sup>33</sup> 39 & 40 Geo. III, c. 79, s. 11.

<sup>34</sup> 47 Geo. III, Sess. 2, c. 68, s. 8.

regulations respecting their collection.<sup>55</sup> The same Statute removed doubts as to their competence to make Articles of War and otherwise provide for the discipline of the Company's Indian troops.<sup>56</sup>

*Shortcomings of the Legislative System  
as it Prevailed in 1834*

It will be clear from this analysis that the system of legislation prevailing in British India in 1834 was not the product of any careful planning. As in the case of most English institutions, it was of haphazard growth, the result of adjustments made to meet certain urgent needs and situations as they cropped up, often just a *post facto* approval by Parliament of the steps taken by the administrators in India. No comprehensive attempt had as yet been made to set things in order and the system suffered from many serious defects.

To begin with, the machinery of legislation required thorough overhauling. Its most serious defect lay in the veto vested in the Supreme Courts in respect of legislation. Although it affected numerically a very small section of the community, its political significance and the influence it had on the course of legislative policy were indeed of the highest importance. It had created in effect in each of the three Presidencies two distinct organs of legislation, the Governor General and Governors in their respective Councils on the one side and the Supreme Courts on the other, and both of them had to assent if a measure was to become law. The want of harmony between the two had made the Company's Governments generally averse to undertaking legislation in respect of the Presidency towns and the British-born subjects, and the existing laws were suffered to continue with the least possible alterations. Apart from the evils arising from this factor, the ill-defined jurisdiction of the Supreme Courts and the general uncertainty of the laws were daily bringing the two bodies into open conflict, much to the detriment of the

<sup>55</sup> 53 Geo. III, c. 155, ss. 98-9. 54 Geo. III, c. 105, confirmed and indemnified past levies which were without authority.

<sup>56</sup> 53 Geo. III, c. 155, s. 96.

prestige of the Company's administration as a whole.<sup>37</sup> The latest outstanding episode was the resistance offered by the Bombay Government to the writs of *Habeas Corpus* issued by the Supreme Court in respect of certain persons detained by the orders of the Provincial Courts.<sup>38</sup> The Privy Council held the writs to have been issued in excess of the powers of the Supreme Court,<sup>39</sup> but the whole episode brought into relief the very unsatisfactory nature of the existing state of affairs. Whatever the justification was for instituting the veto in 1773, and for retaining it in later years in respect of persons and places coming within the jurisdiction of the Supreme Courts, there was now no one left to defend it; even the judges of the Supreme Courts favoured its abolition. This measure, it was believed, would also bring in its train another benefit. It would put an end to the unnatural separation of the Presidency towns from the mofussil areas and help in the establishment of a common legislative system.

Another source of evil was the combination of the executive and the legislative functions in the same hands. This was a survival of the system under which all the supreme functions of government—executive, legislative and judicial—were discharged by the Governor General or Governors in Council. Early in the 19th century, they ceased to constitute the Sadr Courts, and steps were also taken to relieve in most cases individual members of the Councils of their judicial responsibilities. But the separation of the legislative from the executive functions had yet to take place. The inevitable effect of vesting the executive governments with legislative functions was that these duties were grossly neglected or inefficiently performed. Even in normal times, the innumer-

<sup>37</sup> See in particular minutes by C. T. Metcalfe, 15 April 1829; Holt Mackenzie, undated; and Sir C. E. Grey, 2 October 1829: Parl. Papers, H. C. No. 320 E of 1831, pp. 13-25, 27-31, & 54-78.

<sup>38</sup> In his evidence before the Parliamentary Committee, Holt Mackenzie characterised the incident as "the most remarkable one since the dissensions in Bengal which gave occasion to the Act of 1781". Parl. Papers, H. C. No. 735 I of 1831-32, Q. 787. For further details of the incident, see *ibid.*, Q. 785-808.

<sup>39</sup> H. Cowell, *History and Constitution of the Courts and Legislative Authorities in India* (Calcutta, 1936), p. 155.

able problems in the governance of a vast country were enough to tax the energy of the executive. It was much more so at a time when the British Empire in India was rapidly expanding, and military matters and dealings with the Indian States claimed its first attention. There was a strong case for the constitution of distinct legislative bodies comprising persons with legal knowledge and judicial experience and representative of Indian opinion. And, again, while some provision was made to enable the subordinate authorities and the public to offer suggestions and make proposals,<sup>40</sup> and the Governor General and Governors were expressly denied the power to overrule their councils in respect of enacting laws and imposing new taxes,<sup>41</sup> the legislative process resembled very much the proceedings of the executive government.<sup>42</sup> A revision of the procedure of the Councils was necessary to ensure that there was no haste or precipitation, that every measure, before being enacted, received adequate publicity and public opinion on it was fully elicited, and that there was "due deliberation" at meetings for purposes of legislation.

Another defect of the existing system was the inadequacy of the machinery to co-ordinate the legislative policies of the Governments of the three Presidencies. The Governor General of Bengal in Council was not vested with any specific power of control in respect of legislative matters, but he had

<sup>40</sup> Bengal Regs. XX of 1793 and XXIX of 1795; Madras Reg. X of 1802; and Bombay Reg. I of 1827. In his evidence before the Parliamentary Committee, Holt Mackenzie observed that there were references and consultations with the subordinate authorities, but they were not systematic or obligatory and the officers suffered from a sense of inferiority. Parl. Papers, H.C. No. 735 I of 1831-32, Q. 813 & 827-32.

<sup>41</sup> 33 Geo. III, c. 52, s. 51.

<sup>42</sup> The evidence tendered before the Parliamentary Committees contains many interesting reflections on the point. James Mill observed, "The Governor General in Council at present, properly speaking, is an administrative council and nothing more. It has hitherto done something in the business of legislation for which it is very badly circumstanced, but its general business and employment is administrative and executive entirely." Parl. Papers, H.C.No. 735 I of 1831-32, Q. 349. And, Holt Mackenzie observed, "It is remarkable how little of our laws or our judicial decisions have been discussed." *Ibid.*, Q. 857; also, Q. 836-7 & 840.

a general controlling authority over the whole of the civil and military governments of the subordinate Presidencies.<sup>43</sup> In practice, this power did not amount to much. The Bengal Regulations, at times, served as models for legislation by the subordinate Governments.<sup>44</sup> But their Regulations were not normally submitted, before or after issue, for the approval of the Governor General of Bengal in Council, and the intervention of the latter was limited to extraordinary occasions and "to the confirmation of large Regulations".<sup>45</sup> As a result, apart from the absence of an adequate check on the legislation of the subordinate Governments, there was striking want of uniformity in the legislative policies of the three Presidencies. The remedy lay either in extending the powers of the supreme Government in India or in making the direction and control of the authorities in England real and effective. In fact, the law vested the Court of Directors and the Board of Control with adequate powers; they could disallow or amend any of the Regulations issued by the Governments in India. But, by its very nature, this was an

<sup>43</sup> 13 Geo. III, c. 63, s. 9, and 33 Geo. III, c. 52, s. 40.

<sup>44</sup> A number of Bombay Regulations were issued under instructions from or with the approval of the Governor General of Bengal in Council, e.g., Regs. III of 1799, I of 1803, II of 1805, II of 1808, and XX of 1830. In his evidence before the Committee of Parliament, James Mill observed, "The subordinate Presidencies have in general looked a great deal to the laws passed in Bengal and it has been their object to frame Regulations upon the plan of the Bengal Regulations." *Parl. Papers*, H.C. No. 735 I of 1831-32, Q. 345.

<sup>45</sup> Lord Bentinck's minute, 14 September 1831. *Parl. Papers*, H.C. No. 549 of 1833, p. 21. Also, evidence of James Mill, *Parl. Papers*, H.C. No. 735 I of 1831-32, Q. 341; Charles Grant's speech, 13 June 1833. Hansard (III Series), 1833, Vol. XVIII, p. 727; Public Letter from Court, 10 December (No. 44) 1834, para. 82; and Memorandum by W. Grey, Secretary to the Government of Bengal, *Parl. Papers*, H.C. No. 207 of 1861, pp. 14-15. In his evidence before the Parliamentary Committee, N. B. Edmonstone, Member of the Supreme Council from 1812-18, stated that the subordinate Presidencies submitted their Regulations for the confirmation of the supreme Government not by law but by an order of the latter. *Parl. Papers*, H. C. No. 735 I of 1831-32, Q. 1721-2. But this statement does not find support from the references cited above or from any other quarter.

extraordinary power and could be used only sparingly. The Statute might have been amended to direct the Governments in India to obtain the prior sanction of the authorities in England for all their legislation, as was the rule before the passing of the Regulating Act of 1773. But such an attempt to administer India from England was not a very practicable proposition. The solution lay clearly in the direction of augmenting the powers of the supreme Government in India.

And, lastly, the legislative authority of the Presidency Governments was much too narrow and restricted to meet the requirements of a vast growing empire. The Charters of 1726 and 1753 had conferred on them, in respect of the Presidency towns, only the power to frame local or subsidiary laws, and these were to be reasonable and not contrary to the laws of the English realm. The phraseology remained the same under the Regulating Act of 1773 and there was also no substantial addition to this power in later years.<sup>46</sup> Since the Presidency towns were deemed to be British territory and their inhabitants His Majesty's subjects, the British Crown and Parliament were the only sources of authority in their case, unlike in the case of the mofussil areas. This limited power was very inadequate to meet the needs of these towns and of the British-born subjects. The English law as it stood in 1726 and the subsequent enactments specially made applicable to India were in force in them, except in the case of the Hindus and Muslims in certain specified matters. The Supreme Courts and the subordinate courts constituted in these towns followed the procedure of the courts in England. Parliament had passed a number of laws from

<sup>46</sup> According to the well-known construction of Sir Edward East in the case of *Silk Buckingham against the Press Regulations*, which came up for hearing before the Privy Council in 1824-25, the local legislative power "was to be confined to mere police regulations for preserving the peace, preventing and punishing nuisances, and the like, and was not to be extended to a general power of making original laws affecting the liberty or title to property of the inhabitants of Calcutta, including all descriptions, or even the laws, usages and customs of the native inhabitants though a new law should be given by the local Government to affect the inhabitants of the Provinces in the same respects". Cited in *Minute by Hon. Sir E. Ryan, Judge of the Supreme Court, 2 October 1829, Parl. Papers, H. C. No. 320 E of 1831, p. 97.*



time to time concerning them, many of them on matters of detail. None of these could be altered in India, and Parliament did not have the requisite knowledge and time, or abiding interest, to effect timely reforms.

In the case of the mofussil areas, difficulties arose from the uncertainty of the basis of the legislative authority exercised by the Company's Governments in India. Parliament had pursued a very cautious policy in legislating on the subject in view of the *de jure* claims of the Mughal Emperor and the political situation in the country. The power "to frame Regulations for the Provincial Courts and Councils" conferred by the Statute of 1781 was the only express grant of legislative authority. In addition, Parliament had *ex post facto* recognised, through references and allusions and not directly, certain powers exercised by the Company's agents without proper authority. These powers, thus derived from Parliament, did not extend to certain important matters such as revenue and taxation.<sup>47</sup> The Presidency Governments sought to make up the deficiency by claiming and exercising the powers of the Indian princes they had supplanted, either on the ground that *de jure* they were still merely the agents of the princes or on the ground that they inherited the powers from them as successor governments. Now that the sovereignty of the British Crown and Parliament was no longer in doubt and there was no necessity to camouflage this power any more, the time had come to place the legislative authority of the Company's Governments in India in respect of the mofussil areas on a firm statutory basis.

<sup>47</sup> "Some of the most important Regulations of the Indian Governments have been made without the direct or express authority of Parliament, and are most easily justified, as being in the exercise of the old legislative powers of the former governments not superseded, and therefore continuing to subsist. Some of the Regulations, about 1793, were of this description. The imposition of the taxes in the Provinces is perhaps an instance, and it is a power which might come to be a subject of serious discussion and, if British persons are to be permitted to hold lands throughout India, of vital importance." Letter from the Judges of the Supreme Court at Calcutta to the Secretary of the Board of Commissioners of India, 16 October 1830, Parl. Papers, H. C. No. 320 E of 1831, pp. 176-7.

*Evolution of Law and its General State*

From a consideration of the nature and growth of the legislative machinery up to 1834, we may pass on to examine the general state of law in India during the period. When the English came to this country, they brought with them their own laws for the settlement of disputes among themselves. With the rise of their factories English law came to be recognised as the law of the Company's settlements. Indians resident in the factories were, however, allowed the enjoyment of their own laws in such matters as inheritance and marriage. When the Company ceased to be merely a mercantile body and became a territorial ruler, Clive and his successors worked on the principle that the country's laws should, in general, be left undisturbed. But, in certain quarters, the Regulating Act was taken to have introduced English law into the newly acquired territories supplanting the earlier laws of the land. The Act of 1781, however, made it clear that Parliament had no such intention.<sup>48</sup> English law was to be applicable only in the Presidency towns and for the British-born subjects resident in the mofussil areas. The Hindus and Muslims residing in the Presidency towns were to be governed by their own laws in respect of inheritance and succession and "all matters of contract and dealing between party and party", and in matters relating to caste. In other matters they were subject to English law in the same manner as the other inhabitants of the towns. This arrangement was largely a confirmation of the practice sanctioned by law and custom over many decades. English law thus came to be firmly established as the *lex loci* of the Presidency towns and as the law applicable to the British-born subjects in India.

The development of law outside the Presidency towns followed different lines. The basic approach in their case was that the people of the country should be protected in the

<sup>48</sup> Lord North explained that, in passing the Regulating Act, it had not been intended "to extend the British laws in their unintelligible state. (for so might they appear to the natives of a country in which they never had been promulgated) throughout the vast continent". G. C. Rankin, *Background to Indian Law* (Cambridge, 1946), p. 8.

enjoyment of their own laws. The content and state of these laws when the English first came to India have been succinctly described as follows: "First, a large and elaborate system of inheritance and family law; Mahommedan law fairly uniform throughout India, though in some parts of the country modified by Hindu customs; but Hindu law less uniform. Mahommedan law was contained in treatises which were posterior to the *Koran* and consisted of commentaries upon that book and upon the traditions that had grown up round it. Much of Hindu law was contained in treatises very ancient and credited with divine origin, but a portion of it was contained in the commentaries of later day Hindu commentators. Secondly, a large mass of customs relating to the occupation and use of land and of various rights connected with tillage and pasturage, including water-rights, rights of soil, accretion on the banks of rivers, and forest rights. The agricultural system and revenue system of the country rested upon these land customs, which were mostly unwritten and which varied widely in different countries. Thirdly, a body of customs, comparatively scanty and undeveloped, but still important, relating to the transfer and pledging of property and to contracts, especially commercial contracts. Fourthly, certain penal rules drawn from Mahommedan law and more or less enforced by Mahommedan princes." Further, "There were considerable branches of law practically non-existent. There was hardly any law of civil and criminal procedure, because the methods of justice were primitive. There was very little of the law of torts, and in the law of property, of contracts and of crimes, some departments were wanting or in a rudimentary condition. There was no law relating to public and constitutional rights, because such rights did not exist."<sup>49</sup>

While the Presidency Governments were not in general disposed to interfere with the laws and usages of the people as they found them, it was necessary for them to lay down how those laws and usages were to be ascertained, conflicts resolved and lacunae filled in. In the field of penal law, the Hindu law had been mostly supplanted by the Muhammadan law over centuries of Muslim rule in Bengal and Madras, and

<sup>49</sup> B.K.Acharyya, *Codification in British India* (Calcutta, 1914), pp.78-9.

the latter was, therefore, accepted as the law for these provinces. British ideas of justice and a number of other factors led to gradual modifications in this law, and in course of time it had changed almost beyond recognition. Still, the Muhammadan criminal law continued to be for long, in principle, the basic law for these provinces. It was set aside only with the enactment of the Penal Code in 1860.<sup>50</sup> In Bombay, large parts of the territories were not under Muslim rule at the time of their annexation. Both the Hindu and Muhammadan systems of criminal law were, therefore, accorded equal recognition there, and in the case of Christians, Parsis and others, English law was applied. The multiplicity of laws to be enforced made penal law reform more urgent in Bombay than elsewhere, and Bombay Regulation XIV of 1827 provided the province with a logical and self-contained code.

In the field of civil law, the foundations of the policy to be pursued were laid down by Warren Hastings in 1772 in the following words: "That in all suits regarding inheritance, marriage, caste and other religious usages or institutions the laws of the *Koran* with respect to Mahommedans, and those of the *Shaster* with respect to Gentoos, shall be invariably adhered to; on all such occasions the *Moulavis* or *Brahmans* shall respectively attend to expound the law."<sup>51</sup> The limitations of this provision became soon obvious. It was necessary to clarify what laws were to be applied in respect of matters not covered by the above, and what laws were to be applied in the case of persons who were neither Hindus nor Muslims or where both the parties to a suit did not belong to the same religion. Further, the laws of the Hindus and the Muslims were not contained only in the *Koran* and the *Shastras* respectively. There was a whole system of legal literature that had grown up in respect of each of the communities with different schools of thought, and there were also the customs and usages varying from caste to caste and from one part of the country to

<sup>50</sup> Under Bengal Reg. VI of 1832, s. 5, non-Muslims could claim exemption from being tried under that law. *Ibid.*, p. 210.

<sup>51</sup> Letter dated 15 August 1772 containing an extract from the Proceedings of the Committee of Circuit, dated 28 June 1772. G. W. Forrest (Ed.), *Warren Hastings*, Vol. II (Oxford, 1910), p. 295.

another. The naive simplicity of the provision in Warren Hastings's instructions betrayed great ignorance of the immensity and complexity of the problem that the Company's judges and administrators were called upon to face. Subsequent Regulations and judicial decisions attempted to make good these lacunae. The most important of them was the Regulation of 1781, drafted by Sir Elijah Impey. It directed "that in all cases, for which no specific directions are hereby given, the judge of the *Sudder Dewannee Adawlut* do act according to justice, equity and good conscience".<sup>52</sup> This provision was a solvent of most of the difficulties that were likely to crop up. It enabled the judges to extend to the Europeans, Jews, Armenians, Parsis, etc. the benefit of their own laws as far as they could be ascertained, even though there was no specific reference to any of them in the Regulation of 1772 or any of the subsequent Regulations. It helped them also to harmonise contradictory authorities that were cited, decide cases in which the parties belonged to different religions, and fill up the large gaps in the legal systems that came into view from time to time.<sup>53</sup> Thus, the administration of justice had its foundation in this medley of legal systems and traditions.

Apart from the formulation of these basic policies, the attention of the Company's Government was largely confined to matters relating to administration of justice, levy and collection of taxes, and criminal law. Reforms in respect of the first two subjects were necessitated by the very unsatisfactory state of the judicial machinery and by the many problems that arose in the field of land-revenue administration. As regards criminal law, changes were introduced mainly with the object of mitigating the harshness of the Muhammadan law in some cases and of making it more effective in

<sup>52</sup> A similar provision was made in Madras by Reg. II of 1802, s.17. The analogous provision in the Elphinstone Code provided that, in the absence of an Act of Parliament or Regulation, the law to be observed should be "the usage of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of specific law and usage, justice, equity and good conscience alone". Bombay Reg. IV of 1827, s. 26.

<sup>53</sup> For the significance of the provision in Indian legal history, see G.C. Rankin, *Background to Indian Law* (Cambridge, 1946), Chaps. I & X.

others. The growth of Regulation law during the period was on the whole quite slow. This was largely due to the general unwillingness of the Governments to interfere with the laws and usages of the people and the established order, and also to their preoccupation with pressing political and military problems.

Thus, at the time of the enactment of the Charter Act of 1833, except for the improvements which naturally followed the establishment of a strong, stable and orderly government, the state of law had not much improved from what it was at the beginning of the British rule. To the jumble of Indian laws, further elements of confusion were added by the introduction of English law, of a government with a multiplicity of ill-coordinated law-making and judicial bodies, and of a new body of administrators with little or no legal training and unacquainted with the country and its people. The first and the most glaring defect of the existing system was lack of uniformity in matters in which uniformity could easily be obtained, and the absence of it was hardly justified. In the realm of penal law, there were great disparities in the penalties prescribed for crimes in the different Presidencies and as between the Presidency towns and the mofussil areas.<sup>54</sup> There were nine different systems of civil procedure simultaneously in force in Bengal: "four in the Supreme Court, corresponding to its common law, equity, ecclesiastical and admiralty jurisdictions; one for the Court of Small Causes at Calcutta; one in the Military Court of Requests; and three in the courts of the East India Company, one for regular suits, a second for summary suits, and a third applicable to

V2-56, 2<sup>nd</sup> M.C. 1734 K3 52637.

<sup>54</sup> In his letter forwarding the draft penal code to Auckland on 14 October 1837, Macaulay wrote: "In Bengal serious forgeries are punishable with imprisonment for a term double of the term fixed for perjury; in the Bombay Presidency, on the contrary, perjury is punishable with imprisonment for a term double of the term fixed for the most aggravated forgeries; in the Madras Presidency the two offences are exactly on the same footing. In the Bombay Presidency the escape of a convict is punished with imprisonment for a term double of the term assigned to that offence in the other two Presidencies, while a coiner is punished with little more than half the imprisonment assigned to his offence in the other two Presidencies." Parl. Papers, H. C. No. 673 of 1837-38, p. 4.

the jurisdiction of the Deputy Collectors in what were called resumption suits".<sup>55</sup> As regards the law relating to contracts, English law was in force in the Presidency towns, but the Hindus and Muslims were given the benefit of their own laws. In the mofussil areas, in the absence of any other specific law or usage, the rule of "justice, equity and good conscience" held the field. There was a similar lack of uniformity in other branches of law as well.<sup>56</sup> The Parsis were subject to English law in the Presidency towns even in such matters as inheritance, while they were allowed the benefit of their own laws and usages in the mofussil areas.

Apart from this lack of uniformity, certain important branches of law such as evidence, contract and limitation were in a rudimentary state, and there were many glaring gaps in others. A number of new problems such as the inheritance rights of converts and the position of aliens and the Anglo-Indians had arisen calling for solution. As a sample of the matters which required to be settled may be mentioned: "Relations of the Government to the foreign settlements in peace or when captured in war; law of inheritance for country-born Christians of various parentage; modification of Hindu and Muslim laws, as applicable to Calcutta; recovery of small debts from European British subjects living in the mofussil, within ten miles of Calcutta; nature of the interest possessed by British subjects in various kinds of immovable property; administration of estates of Hindus and Muslims residing in Calcutta; execution of decrees passed by the country courts, and of process generally, within Calcutta; exemplification of *ditto*; enforcement of security bonds and the like, given by British-born subjects in suits before the country courts; examination of witnesses at a distance on the principles of 13 Geo. III, c. 63, s. 40 & c., 24 Geo. III, c. 25, s. 78."<sup>57</sup>

<sup>55</sup> B. K. Acharyya, *Codification in British India* (Calcutta, 1914), p. 86. Also, G. C. Rankin, *Background to Indian Law* (Cambridge, 1946), pp. 197-9.

<sup>56</sup> See Acharyya, *op. cit.*, Lecture II, for a clear exposition upon the subject.

<sup>57</sup> Note by Holt Mackenzie (not dated), Parl. Papers, H. C. No. 320 E of 1831, p. 31.

The most serious consequence of this lack of uniformity and completeness was the grave uncertainty as to what the law was on any given subject. Many and loud were the complaints recorded. Lord Bentinck and his Council wrote, "In regard to almost every provision of the British Parliament, whether for defining the legislative authority of the Governments of the several Presidencies, or for prescribing the course to be pursued by them in the executive administration, questions have arisen of a very embarrassing nature. The rules applicable to the Sudder Dewanny and Nizamat Adawlut, and to the subordinate native courts, which rest on Parliamentary enactments, though few in number, have given rise to many doubts and difficulties. Those relating to the rights and obligations of individuals are not free from obscurity".<sup>58</sup> Further, the anomalous jurisdiction of the Supreme Courts, resulting from the defects in Parliamentary enactments, was "productive of alarm to our native subjects, or embarrassments to the Local Governments and discredit to our country".<sup>59</sup> The judges of the Supreme Court at Calcutta were no less trenchant in their criticism. "In this state of circumstances," they wrote, "no one can pronounce an opinion or form a judgment, however sound, upon any disputed right of persons, respecting which doubt and confusion may not be raised by those who may choose to call it in question; very few of the public, or persons in office at home, not even the law officers, can be expected to have so comprehensive and clear a view of the present Indian system, as to know readily and familiarly the bearings of each part of it on the rest".<sup>60</sup> Lord Macaulay declared that what was being administered as law was "but a

<sup>58</sup> Letter from the Governor General in Council to the Judges of the Supreme Court, Calcutta, 14 July 1829, *ibid.*, p. 3.

<sup>59</sup> *Ibid.*, p. 4.

<sup>60</sup> Cited by Sir Charles Grant in his speech in the House of Commons, 13 June 1833, Hansard (III Series), Vol. XVIII, 1833, p. 729. The conclusion finds powerful support in the various minutes recorded by the judges in their correspondence with the Governor General in Council. See in particular "Some observations on a suggestion by the Governor General in Council as to the formation of a code of laws for the British territories in the East Indies". Parl. Papers, H. C. No. 320 E of 1831, pp. 111-14.



kind of rude and capricious equity.”<sup>61</sup> While in later years strong differences arose as to the pace, scope and form which legal reforms were to take, at this stage there was general agreement among the authorities in India that the state of law in the country was such as to call for urgent and radical changes.

To conclude, the imperfections of the legislative system in force at the time of the Charter Act of 1833 were, in the well-known words of Sir Charles Grant, particularly three: “The first was in the nature of the laws and regulations by which India was governed; the second was in the ill-defined authority and power from which these various laws and regulations emanated; and the third was the anomalous, and sometimes conflicting, judicatures by which the laws were administered, or in other words the defects were in the laws themselves, in the authority for making them, and in the manner of executing them.”<sup>62</sup>

<sup>61</sup> Speech by Macaulay in the House of Commons on 10 July 1833, *Hansard (III Series)*, Vol. XIX, p. 532.

<sup>62</sup> Speech by Charles Grant in the House of Commons, 13 June 1833, *Ibid.*, Vol. XVIII, pp. 727-9.

## CHAPTER II

### LEGISLATIVE SYSTEM, 1834-61

#### *Forces Leading to the Reforms of 1833*

WE have so far discussed the shortcomings of the system of law and legislation as it stood in 1834, but these by themselves cannot account for the changes which took place. Political and social evils tend to persist long after they are recognised as such unless some special forces and circumstances intervene. We shall now consider the factors which acted as compelling forces in the direction of reform.

We may rule out at the outset public opinion in India as having been of any great importance in effecting the changes. There was, as yet, no manifestation of political awakening among the masses. The Indian press was still in its infancy, and other ways of organised expression of public opinion were undeveloped. Evils and oppressions were silently suffered, and when they were too much to bear there were popular outbursts of a local character, sometimes violent and at others taking the form of passive resistance.<sup>1</sup> The non-official Europeans were the only active and politically conscious group, especially in Bengal. In the large mass of evidence tendered before the Select Committees of Parliament during 1830-32, there are only the views of Raja Ram Mohan Roy to represent the thoughts, feelings and aspirations of Indians in general.<sup>2</sup> In addition, there were representations from the Parsis, Armenians, Anglo-Indians and non-official Europeans, especially in respect of matters affecting their own interests. The disabilities of Christian converts were forced upon the attention of the Government by missionary organisations. But the influence of such representations on policy was only secondary.

<sup>1</sup> S. B. Chaudhuri, *Civil Disturbances, during the British Rule in India, 1765-1857* (Calcutta, 1955), *passim*.

<sup>2</sup> Communications between Raja Ram Mohan Roy and the Board of Control relative to the revenue and judicial systems of India. Parl. Papers, H. C. No. 320 A of 1831, Appendix 20.

The cry for reform came mostly from public servants who became acutely conscious of the shortcomings of the system in the course of their administration. The subjects which received the greatest, perhaps disproportionate, attention were the uncertain and anomalous jurisdiction of the Supreme Courts as well as the veto vested in them in respect of legislation affecting matters coming within their jurisdiction. The activities of the Crown Courts in the Presidency towns, in so far as they affected the mofussil areas, were a constant source of irritation. The open and unseemly conflicts between them and the Presidency Governments were bringing the Company's administration as a whole into disrepute. The correspondence of 1829-30 between the judges of the Supreme Court at Calcutta and the Governor General in Council that set the ball rolling in respect of legislative reform had its origin in these troubles.<sup>3</sup> Agreed proposals were submitted by the judges and the Government for the consideration of the Court of Directors, and the arguments advanced by them in favour of reform influenced greatly the decisions which were finally reached.

Economic considerations also played an important part in bringing about the changes. Indian budgets were suffering from continuous deficits,<sup>4</sup> and the commercial profits of the Company accruing from the China trade were being utilised to balance them. But the Company's monopoly of the trade was under fire in England and it was clear that the Free Traders would win when the Company's Charter came up for

<sup>3</sup> "The discussions which passed between the Supreme Court at Bombay and the Government of that Presidency appears to me to have given rise to the various questions connected with the influence and power which the Supreme Courts have a right to exercise over the natives of India and to the proposition for a legislative council for India." Evidence by Peter Auber, Parl. Papers, H. C. No. 735 I of 1831-32, Q. 1351. See also evidence by Sir Edward Ryan, Parl. Papers, H. L. No. 20 of 1852-53, Q. 2356. The full text of the correspondence is contained in Parl. Papers, H. C. No. 320 E of 1831.

<sup>4</sup> "The average annual deficiency of the Indian revenue, after defraying all charges abroad and at home, amounted to £2,878,031 in five years ending 1828-29." Amles Tripathi, *Trade and Finance in the Bengal Presidency* (Calcutta, 1956), p. 218.

review. One of the major tasks entrusted to Lord Bentinck was to reduce the expenditure and balance the budget.<sup>5</sup> In 1828 the Governor General in Council observed that instances of wasteful expenditure by the subordinate Presidencies were coming too often to his notice in a casual manner and the whole subject required detailed and careful investigation. Two committees, one for civil and the other for military expenditure, with representatives from each of the three Presidencies, were appointed for the purpose.<sup>6</sup> The report of the Civil Finance Committee and the views expressed by Lord Bentinck and his Council formed the basis of the highly centralised system of administration with stringent financial controls set up under the Charter Act of 1833.<sup>7</sup> Centralisation in the administrative and financial spheres was bound to influence greatly the decision on the subject of legislation. In particular, His Majesty's Government wanted very much to abolish the Councils at the subordinate Presidencies, although the proposal was stoutly resisted by the Court of Directors.<sup>8</sup> This was mainly intended to secure economy; but its effect was to strengthen the case for centralised legislation, since legislation by the subordinate Presidencies without their Councils was not at all a feasible proposition.

While these factors related mostly to conditions prevailing within India, the trend of public opinion in England also greatly influenced the course of events. One of the matters on which public attention had been concentrated in England

<sup>5</sup> *Ibid.*, pp. 218-19. "Ellenborough, with his usual insight, had seen the question of the cessation of the China monopoly as in essence a financial one, and his drastic orders to Bentinck to reduce the charges of government in India had been expressly designed to obtain a surplus in the Indian revenues." C. H. Philips, *The East India Company, 1784-1834* (Manchester University Press, 1940), p. 288. For the instructions, see Edward Thompson, *The Life of Charles Lord Metcalfe* (London, 1937), Appendix A.

<sup>6</sup> Lord Bentinck's minute dated 7 October 1828 and the resolution of the Governor General in Council in the Territorial Department, 25 November 1828, Parl. Papers, H. C. No. 734 of 1831-32, General Appendix, pp. 112-14.

<sup>7</sup> *Ibid.*, General Appendix III.

<sup>8</sup> Parl. Papers, H. C. No. 549 of 1833, pp. 55 & 64.

over many decades was the question of throwing India open to British settlement and enterprise.<sup>9</sup> Commencing with the Regulating Act of 1773, severe restrictions had been placed on the entry of the British-born subjects of His Majesty, and also of other Europeans, mainly with the object of protecting the people of India from unprincipled adventurers. The permission of the Court of Directors and the Board of Control was necessary under the law for them to proceed to India. The Governor General and Governors in Council could also grant them permission to reside within their respective Presidencies under intimation to the Court of Directors. These referred only to residence within the three Presidency towns. For residing beyond a radius of ten miles from these towns, special license had to be taken from the Local Government concerned, and there was similar restriction on holding land or landed interest, directly or indirectly, in the mofussil areas. The policy of the Court of Directors and the Governments in India till 1834 was to give permission to reside within or without the Presidency towns very sparingly and that after carefully checking the *bona fides* and the object of settlement of each applicant. This policy had the support of successive administrators like Lord Cornwallis, Henry Dundas and Mountstuart Elphinstone, and, indeed, at the time of the revision of the Charter in 1813, opinion was strongly against any relaxation of the existing restrictions. Opposition to the policy increased greatly in later years, and British capitalists and entrepreneurs lobbied actively to secure free outlet for their investments and enterprise. By the time the Charter came up again for review in 1833, both the Tories and the Whigs were committed to the abolition of the Company's monopoly of the China trade and also to the free admission of European British subjects into India. While the Court of Directors strongly opposed both these moves, the attitude of the authorities in India had become quite favourable towards the latter question. In 1824 the Government of Bengal passed a resolution permitting duly licensed Europeans to take leases of land in the

<sup>9</sup> For papers on the subject, see Parl. Papers, H. C. No. 734 of 1831-32, General Appendix V, pp. 253-378. Also, Report from the Select Committee on the Affairs of the East India Company, *ibid*, p. 26-7.

mofussil areas for the cultivation of coffee, subject to certain conditions and restrictions. In 1828 the concession was extended to those who wanted land for the cultivation of indigo or any other agricultural produce.<sup>10</sup> During the discussions relating to the latter concession, Lord Bentinck and his Council expressed themselves strongly in favour of opening India to free settlement by Europeans, as they considered it to be a sure means of developing the country. The main ground of the opposition was the old fear of oppression by unscrupulous European adventurers. On this point, Bentinck assured, "Of all places in India, Bengal, independently of its having been the longest subjected to a regular English Government, presents the least possible ground of apprehension from the settlement of Europeans, whether we look to the character of the inhabitants or the nature of the country."<sup>11</sup> He gave it as his decided opinion, "On whatever side, therefore, the subject is considered, the more does it present the prospect of advantage from the free resort of Englishmen to India".<sup>12</sup> The few leaders of Indian opinion at the time also expressed themselves strongly in favour of their admission.<sup>13</sup>

There was, however, one big hurdle to overcome. Owing to the turn legal and judicial developments had taken, European British subjects were largely exempt from the jurisdiction of the Company's Courts. They had a right to be tried, even in respect of causes of action arising in the mofussil areas, by the Supreme Courts at the Presidency towns, either in their original jurisdiction or by way of appeal, both in civil and criminal matters. They had come to regard English laws and "English courts" almost as matters of birth right, even though they were living in an alien land amidst

<sup>10</sup> The Court of Directors censured the Government of Bengal for taking this step and ordered important modifications in the Regulation. Letters from the Court of Directors to the Governor General in Council, 8 July 1829 and 10 April 1832, *ibid.* General Appendix, pp. 270 & 334.

<sup>11</sup> Minute dated 8 December 1829., *ibid.*, p. 286.

<sup>12</sup> Minute dated 30 May 1829., *ibid.*, p. 279.

<sup>13</sup> Remarks by Raja Ram Mohan Roy on the subject, dated 14 July 1832. *ibid.*, p. 341. Views of Raja Ram Mohan Roy and Dwarkanath Tagore: J. K. Majumdar, *Indian Speeches and Documents on British Rule, 1821-1928* (London, 1937), pp. 42-5.

alien peoples. They were not likely to give up these privileges easily. The costliness of the proceedings in the Supreme Courts, the complicated and alien character of the laws administered by them, and the long distances which litigants had to cover, however, meant, in practice, a virtual denial of justice to the people of the country who had occasion to look to them for redress.<sup>14</sup> There was a very general recognition of this fact, and any relaxation of the restrictions on the entry of Englishmen into India, particularly outside the Presidency towns, was bound to aggravate the position. Unqualified subjection of European British subjects to local laws and local courts should be, it was felt, an essential prerequisite to their free admission into the country.<sup>15</sup> But, the state of laws and the system of justice outside the Presidency towns were considered to be in such a poor state that the British subjects could not be made amenable to them unless they were radically altered. Thus, the opening of India to the free operation of British capital and enterprise came to be closely linked with that of legislative reform: there was to be codification and legal reform since Englishmen would not be willing to subject

<sup>14</sup> In his minute dated 9 May 1836, Macaulay observed that he firmly believed that the evils arising out of the privileged position of the European British subjects outside the Presidency towns had "ruined more native families than a pindaree invasion". Leg. Dep. Pros., 9 May 1836, No. 10.

<sup>15</sup> In the evidence tendered before the Select Committees of Parliament, the proposal to remove the restrictions on Englishmen resorting to India, subject to certain safeguards, received considerable support, e. g., James Mill (Parl. Papers, H. C. No. 735 I of 1831-32, Q. 372-3), John Sullivan (*ibid.*, Q. 563), Holt Mackenzie (*ibid.*, Q. 752), C. Lushington (*ibid.*, Q. 1001-12), and A. D. Campbell (*ibid.*, Q. 1495-7). F. J. Shore also expressed strongly in favour of the proposal. *Notes on Indian Affairs* (London, 1837), Vol. I, pp. 40-50. Apart from the opposition of the Court of Directors, the move was strongly criticised by some responsible administrators. Mountstuart Elphinstone warned that the settlers would be "turbulent and difficult for the Government to manage". Parl. Papers, H. C. No. 735 I of 1831-2, Appendix A, pp. 293-4. N. B. Edmonstone was afraid that Englishmen, once admitted, would begin to agitate for English institutions. *Ibid.*, Q. 1657-60, 1671-2 and 1757. Sir John Malcolm was of the opinion that the proposed changes in the judicial and legal system were too high a price for securing European capital and enterprise. *The Government of India* (London, 1833), p. 168.

themselves to the system of laws and courts prevailing at the time in the mofussil areas<sup>16</sup>; an English lawyer was to be appointed as a member of the Governor General's Council to ensure that due attention was paid to English laws and customs and to the rights of European British subjects<sup>17</sup>; legislative authority was to be centralised and vested in the Governor General in Council, since it was "just and natural"<sup>18</sup> that Englishmen should live under the control of the same laws throughout British India; and the legislative authority of the Governor General in Council was to be strengthened to enable him to make necessary Regulations to counteract the possible evil effects of their free admission.<sup>19</sup> Indeed, the

<sup>16</sup> There is a clear exposition of this view in the report of Charles Grant's speech in the House of Commons on 13 June 1833: "All authorities, then, were in favour of admitting Europeans, provided they were subject to the same laws and institutions and were placed on the same footing as the natives. With authorities to overlook Europeans, they might freely enter the country. It was equally just in principle, and warranted by practice, that the system of judicature should place the natives and Europeans on the same footing; and unless they were placed on the same footing, it would not be possible to allow Europeans free access to India. In the meantime, he trusted that the Legislature would arm the Governments in India with power to make such regulations for the control of the natives and Europeans as would have the effect of gradually approximating the two peoples, and the laws of the two countries, and pave the way for ultimate assimilation." Hansard (III Series), Vol. XVIII, 1833, pp. 736-8.

<sup>17</sup> Regarding the appointment of the Fourth or Legal Member to the Council, the Court of Directors observed that it must be regarded to some extent "as a substitute for that sanction of the Supreme Court of Judicature which has hitherto been necessary to the validity of regulations affecting the inhabitants of the Presidencies, but which under the new system will no longer be required". Public Letter from Court, 10 December (No. 44) 1834, para. 20. Also, letter from the Chairman and Deputy Chairman of the Court of Directors to the President of the Board of Control, dated 15 December 1842, Parl. Papers, H. L. No. 20 of 1852-53, p. 593.

<sup>18</sup> Public Letter from Court, 10 December (No. 44) 1834, para. 11.

<sup>19</sup> The Court of Directors observed that in deciding upon the best mode of constituting the Indian Governments "the decisive consideration with the Legislature was the necessity of strengthening the Supreme Government in consequence of the free admission of Europeans into the interior of the country". Justifying the centralisation of the legislative



stress on the proposed free admission of Englishmen into India is so great in the various State papers that one is apt to overlook or minimise the importance of the other factors which led to legislative reform.

The agitation of British traders and manufacturers to secure the opening of India to free settlement by British European subjects received powerful support from the Evangelical movement, which wielded enormous influence over the people of England. The Evangelical revival in the last decades of the 18th century had its origin in the Methodist movements of Wesley and Whitefield. One of its primary objectives was to carry the light of Christian faith to pagan lands. The elder Grant and Sir John Shore were early Evangelicals who got the movement greatly interested in India. When the Company's Charter came to be renewed in 1813, largely because of Evangelical influence, an Indian Church with a bishop and three arch-deacons was established, missionaries were given a large measure of freedom to carry the message of the Gospel, and a small provision was made for the spread of education. At the time of the renewal of the Charter in 1833, there was a natural alliance between British commercial interests and the Evangelicals to secure the opening of India.<sup>20</sup> While the former wanted a free field for their investments, the latter considered it essential for the spread of true religion and knowledge. In addition, Evangelical influence is seen in the provision for the abolition of slavery in the Charter Act, and in the subsequent years in the opposition to the emigration of Indian labourers, which adversely affected the condition of the emancipated slaves in the Colonies.

While it is axiomatic that contemporary political ideas largely determine the pattern of constitutional changes, the influence of abstract political ideas on legislation was perhaps

authority, it observed that the difficulties in respect of legislating for the Europeans in India would be greatly aggravated "if the different Governments were all armed with co-equal and independent legislative powers, and if they were to proceed to exercise such powers at their discretion respectively, and perhaps with very different views and according to inconsistent principles". *Ibid.*, paras. 11-12.

<sup>20</sup> Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), p. 40.

never so direct or so marked in the evolution of Indian Governmental system than on the present occasion. India was at this time the battleground for three rival schools of thought: the old Whig liberal tradition, typified in Indian administration by the reforms of Cornwallis, the paternalist tradition of Munro, Malcolm and Elphinstone, and the new reformist Utilitarian school, of which the founder-father was Jeremy Bentham. An indication of their respective stand-points would give us an idea of their contribution to the formulation of the Charter Act. The protagonists of the Whig liberal tradition had a holy horror for government and authority. Government was a necessary evil and the scope of its activities was to be curtailed to the minimum. To prevent abuse of authority, they thought constantly in terms of checks and balances: executive and judicial functions were to be vested in separate hands and the executive was to be strictly subordinate to the judiciary; administrative authority was to be diffused by setting up boards such as the Revenue Board; and Councils were essential to act as a break on the Governors and the Governor General. While they were certainly aware of the value of a simple system of laws, they did not think in terms of major legislative and legal reforms, because their whole philosophy was opposed to intervention by Government. With the background of misrule in the early days of the Company's rule, they advocated maintenance of a steel-frame of British civilians to secure efficiency and justice. They did not contemplate extensive use of the native agency; in their scheme of things there was no pressing need for it either. They were Anglicists with little respect for Indian culture and institutions, but they were poor reformers as they did not want the Government to interfere in the life of the people.

The basic approach of the paternalists was very different from that of the Whig liberals. According to them, the Indian administrative system was to be founded on the principle of trusteeship, and designed to suit the genius of the people and the conditions of the country. There was no necessary conflict between the interests of the rulers and the ruled. Democratic principles could not be applied to India,

and the administration of the country was to be based on principles of benevolent despotism. The District Officers, who represented the Government at the lowest level, were to be invested with a wide range of powers and with as much discretionary authority as was consistent with good government. The paternalists were opposed to executive and judicial powers being vested in separate hands, since this diminished the traditional awe and respect which the people evinced towards the representatives of the King and also weakened the authority of the latter in a practical way. They had no patience with boards and councils and the whole concept of checks and balances. Success in administration, according to them, depended upon inspired leadership of gifted persons, dedicated to a life of service. Their approach to native religion and culture was one of sympathy and understanding. Their respect for traditional values made them staunch opponents to the new-fangled ideas of westernisation. Reforms were to be introduced, if necessary, by stages and without involving serious rift with the past. Conservatives by faith, the paternalists produced a long succession of brilliant administrators and reformers. With the distinguished services rendered by Munro, Malcolm, Elphinstone and Metcalfe, their reputation was quite high at this time.

The Utilitarians or the Benthamites were a new school of reformers, who, in alliance with the free traders and the Evangelicals, exercised enormous influence in England. As G. M. Young has observed, "In discipleship or reaction no young mind of the thirties could escape their influence."<sup>21</sup> Bentham's approach was empirical, but everything he suggested was governed by certain first principles. Unlike other political philosophers, he had a practical cast of mind, and he put forth a set platform for reformers. He rejected the Whig notion of conflict of interests between the governors and the governed, and proceeded on the basis of identity of interests and harmonious relationship between the two. The scope of governmental activity was not to be circumscribed by rigid notions of individual freedom; it was to be determined wholly by the requirements of public welfare. Bentham's love of

<sup>21</sup> *Victorian England: Portrait of an Age* (O. U. P., 1953), p. 8.

system and order, his desire to settle each point of detail with reference to first principles, made him quite critical of all aspects of administration. He had a neat plan of "scientific administration", worked out in full detail. He took the French bureaucracy for his model, and viewed government on military lines. It was a chain of commands, at the apex of which was Parliament, representing the demos. Executive responsibility was to be concentrated in single officers and not diffused by the constitution of boards and councils. Abuse of authority was to be prevented, not by the Whig expedient of checks and balances and diffusion of authority, but by a properly graded system of supervision and control. There was to be no vagueness about government or its laws. A pannomium or a body of codes was to be prepared, presenting the whole scheme of government and the system of laws by which the people were governed. Bentham's true ideal was the philosopher-king, although he reconciled his system to democracy by accepting the supremacy of Parliament. He was greatly interested in India, which he considered an ideal testing-ground for his theories.

The influence of the Whig liberals, the paternalists and the Utilitarians can be clearly seen in the Charter discussions and the various provisions of the Charter Act. It is difficult to isolate in all cases the various strands of their influence or to label individuals as wholly belonging to this or that school. But the broad trends are clear.<sup>22</sup> In India, the protagonists of the policy of Cornwallis had largely given way to the paternalists, who represented the group mind of the Company's civil servants at their best. But the most potent influence in the shaping of the Charter Act was that of the Benthamites, the Utilitarians or the Philosophic Radicals, as they were variously called. In alliance with the free traders and the Evangelicals, the Utilitarians constituted the broad current of the liberal movement which gained resounding victories in the field of legal and political reform in England. The age of law reform had dawned there more than ten years before the 1833 Charter. In 1828 two commissions were

<sup>22</sup> For a specialised study of the subject, see Eric Stokes, *The English Utilitarians and India* (Oxford, 1959).

appointed, one to enquire into the practice and procedure of the courts of common law, and the other to enquire into the law of real property. The former reported between 1829-34 and the latter before 1833, and a number of reforms were introduced on the basis of their recommendations. In 1833, a Royal Commission was appointed to codify the criminal law of England and it submitted seven reports before it was dissolved in 1845.<sup>23</sup> The Utilitarian influence was at its peak at the time of the Charter discussions in England, and most of those who determined policy were under the Benthamite spell. Lord Brougham, the moving spirit of law reform in England,<sup>24</sup> was the Lord Chancellor of Grey's Ministry, which introduced the Charter Bill in Parliament. Officially, Charles Grant, the younger, as the President of the Board of Control, was the author of the Bill, but his assistants at the Board had more to do with its modelling.<sup>25</sup> Hyde Villiers, Secretary of the Board of Control from May 1831 to his death in December 1832, was a Benthamite.<sup>26</sup> T. B. Macaulay became Assistant Commissioner of the Board of Control in June 1832, and succeeded Villiers as Secretary. He had his differences with Bentham, but he accepted without reservation Bentham's jurisprudence and his ideas of legal reform.<sup>27</sup> Holt Mackenzie had, on his retirement from the Company's service, joined the Board of Control as Commissioner and held the office from 1832 to 1834. His views represented a happy blend of the paternalist and Utilitarian ideas.<sup>28</sup> At the secretariate of the Court of Directors, there was the towering personality of James Mill, who held the high office of the Examiner of Indian Correspondence from 1830 till his death in 1836.<sup>29</sup> He was

<sup>23</sup> Sir William Holdsworth, *A History of English Law* (London, 1952), Vol. XIII, pp. 307-8, and C. Ilbert, *The Mechanics of Law Making* (New York, 1914), pp. 28-30.

<sup>24</sup> "In Brougham it was almost a 'Philosophical Radical' who in 1830 reached the Chancellorship." Elic Halévy, *The Growth of Philosophic Radicalism* (1928), p. 510.

<sup>25</sup> Eric Stokes, *op. cit.*, pp. 179-80.

<sup>27</sup> *Ibid.*, pp. 191-3.

<sup>26</sup> *Ibid.*, pp. 181 & 327.

<sup>28</sup> *Ibid.*, pp. 154-5, 159-63 & 273.

<sup>29</sup> "Bentham had always dreamed of making laws for India; now that James Mill occupied an important post in the India Company, might not his dream become a reality? 'I shall be the dead legislative of British

the high priest of Benthamism and his influence extended far and wide. The Assistant Examiner, Edward Strachey, was also a Benthamite.<sup>10</sup> Their influence on policy is seen clearly in the various State papers in spite of the opposition of the Court of Directors to many of the proposals for reform. In India, too, Bentham cast his spell on many of the top men, and recommendations from India strongly reflected the influence of the new movement. Lord Bentinck, the reforming Governor General, was a great admirer of Bentham and James Mill, and was on intimate terms with leading Utilitarians before his departure to India.<sup>11</sup> He had on his Council Alexander Ross, who proclaimed himself "a disciple of the Bentham school of jurisprudence",<sup>12</sup> and was the most fervent advocate of Utilitarian ideas, with an admixture of Whig liberalism.<sup>13</sup> Of the paternalists, Holt Mackenzie, Secretary to Bengal Government in the Territorial Department from 1817 to 1831, and Mountstuart Elphinstone,<sup>14</sup> Governor of Bombay from 1819 to 1827, exhibited to the largest extent the influence of Benthamite ideas and showed in a practical way how paternalism could be harmonised with the latter. Metcalfe was a true conservative,<sup>15</sup> but even he was not impervious to the new ideas.<sup>16</sup> Outside the Government circles, Sir Edward Ryan, Chief Justice of the Supreme Court at Calcutta, was no "doctrinaire Utilitarian", but he was a staunch advocate of codification and supported many of Bentham's ideas of judicial reform.<sup>17</sup> James Young of the Calcutta house of agency, Alexander and Co., was one of the reforming group of which Ross and Ryan were the other members, and he is said to have exercised enormous influence over the Supreme

India. Twenty years after I am dead, I shall be a despot," Elic Halévy, *The Growth of Philosophic Radicalism* (1928), p. 510.

<sup>10</sup> Eric Stokes, *op. cit.*, p. 50.

<sup>11</sup> *Ibid.*, p. 51.

<sup>12</sup> Parl. Papers, H. C. No. 320 E of 1831, p. 40.

<sup>13</sup> Eric Stokes, *op. cit.*, pp. 234-7 *et seq.*

<sup>14</sup> *Ibid.*, pp. 50 & 148-50. Also, Sir T. E. Colebrooke, *Life of the Hon'ble Mountstuart Elphinstone* (London, 1884), Vol. II, pp. 116-17 and 125.

<sup>15</sup> Eric Stokes, *op. cit.*, p. 18.

<sup>16</sup> Edward Thompson, *The Life of Charles Metcalfe* (London, 1937), pp. 297-8.

<sup>17</sup> Eric Stokes, *op. cit.*, pp. 132, 189, 202 & 214.

Government under Bentinck, with access to confidential papers.<sup>38</sup> Ram Mohan Roy too had come under the spell of Bentham.<sup>39</sup>

The imprints of Benthamism are most clearly seen in the Charter Act from the establishment of a highly centralised system of government, with a single legislature for the whole of India, and the appointment of a Law Commission to prepare general codes. The paternalist influence is seen in the successful resistance to the various proposals to abolish the Councils attached to the Governors, to put an end to the privilege of direct correspondence with the Court of Directors enjoyed by the Governors of Madras and Bombay, and to dissociate the Government of India from the administration of the Lower Provinces of the Bengal Presidency. The exclusion of the judges from the Legislature must be attributed to Whig influence. The free traders and the Evangelicals secured the opening of India to free settlement by British European subjects, but the paternalists succeeded in the inclusion of the various provisions for the protection of the people of the country from the adverse effects of the settlement, especially the provision against discrimination on grounds of religion, race, etc. in the matter of public employment. The clause regarding the abolition of slavery was the distinct contribution of the Evangelicals.

### *The Charter on the Anvil*

While these various forces and influences were at work, the event that precipitated an enquiry and led to the reforms was the renewal of the Company's Charter. Except for this, it is doubtful if Parliament would have been persuaded to evince sufficient interest in the subject of Indian reform. Even so, on this occasion, Parliament's interest centred primarily round the termination of the trading rights of the Company and the terms on which its association with the administration of India was to continue. In spite of this limiting factor, the Charter Act of 1833 was perhaps the most important piece of legislation concerning the Government of India during the last century.<sup>40</sup>

<sup>38</sup> *Ibid.*, pp. 51-2 & 189.

<sup>39</sup> *Ibid.*, pp. 52 & 147.

<sup>40</sup> For a detailed and lucid account of the negotiations and discussions

Owing to the vicissitudes of British party politics and the frequent change of Ministries, different Select Committees of Parliament were set up in 1830 and 1831, and again in 1832. A vast amount of evidence bearing on all aspects of Indian administration and the Company's affairs was collected, and indeed the collection of the last of the Select Committees was, according to Thornton, the largest mass of evidence extant at the time.<sup>41</sup> The thoroughness with which they worked bears a striking contrast to the general indifference exhibited by the Court of Proprietors of the Company and the members of Parliament towards this great measure.<sup>42</sup> Independently of the work of these committees in England, a lot of spade work had been done and all aspects of the subject fully considered in India. The Civil Finance Committee of 1828 provided the necessary arguments for the highly centralised system of government that was set up. The correspondence between the Governor General in Council and the judges of the Supreme Court at Calcutta during 1829-30 initiated discussion regarding legislative and judicial reforms. Elphinstone's Code and the various digests of the Regulations which had appeared<sup>43</sup> showed in a practical way the benefits to be derived from codification. The opinions of the Indian authorities on the subject of European settlement strengthened the hands of persons in England who fought for the opening of India. A number of other questions which came up before Parliament had been thrashed out on different occasions and the data on the basis of which decisions were to be reached had been made available, e.g., slavery in India<sup>44</sup> and the civil services.<sup>45</sup> The details of the Bill that was introduced in Parliament were thrashed out

leading to the enactment, see Peter Auber, *Rise and Progress of the British Power in India* (London, 1837), pp. 658-713, and Edward Thornton, *The History of the British Empire in India* (London, 1843), Vol. V, Chap. 28.

<sup>41</sup> Thornton, *op. cit.*, p. 282. Also, Peter Auber, *op. cit.*, pp. 679-80.

<sup>42</sup> Thornton, *op. cit.*, pp. 315, 321 & 353.

<sup>43</sup> For a detailed account of the progress made in this direction, see B. K. Acharyya, *Codification in British India* (Calcutta, 1914), pp. 56-62.

<sup>44</sup> Parl. Papers, H. C. No. 735 I of 1831-32, Appendix K.

<sup>45</sup> *Ibid.*, Appendix M. Also, Parl. Papers, H. C. No. 734 of 1831-32, General Appendix IV.



during the negotiations between the British Government and the East India Company. The principal spokesman of the British Government in the House of Commons was Charles Grant, President of the Board of Control, ably seconded by Macaulay, who was Under Secretary of State and a member of the Board of Control.<sup>48</sup> In the House of Lords, Lord Lansdowne ably represented the Government. The measure was strongly criticised by Charles W. W. Wynne in the House of Commons and by the Duke of Wellington and Lord Ellenborough in the House of Lords. Grant's well-known resolutions for the termination of the trading activities of the East India Company and the continuance in its hands of the administration of India were passed on 13 June 1833. The Charter Bill was first introduced in the House of Commons on 28 June, and it received royal assent and finally became law on 28 August 1833.

*Legislative Provisions of the Charter Act :  
Centralised Legislation*

The legislative provisions of the Charter Act were based on the following basic principles. The restrictions on European settlement and enterprise were to be mostly abolished, making due provision for the protection of Indians. The disjointed system of governing India with three practically independent Presidency Governments was to give place to a centralised system, and the control exercised from England was to be rationalised and confined to essential matters. And, lastly, the legislative machinery was to be remodelled to effect necessary reforms in the field of law and justice.

Bearing these principles in mind we may examine the different aspects of the legislative provisions of the Charter Act. To take up first the issue of centralised *versus* decentralised legislation, it was a matter closely linked with the general question of relationship between the Centre and the Provinces. While differing on matters of detail and in the emphasis they laid on particular points, the members of the Civil Finance Committee and the Governor General's Council were of the view that the

<sup>48</sup> For the important role of Macaulay, see C. H. Philips, *The East India Company, 1784-1834* (Manchester University Press, 1940), pp. 290-95.

Supreme Government should be divested of every local responsibility, and have as its primary function the supervision and control of the subordinate Governments. The authority of the latter was to be severely limited in administrative and financial matters, and they were to be subject to effective day-to-day control by the Supreme Government. The Bombay and Madras Governments were to be divested of their existing legislative powers, and legislative authority in respect of the whole of British India was to be vested solely in the Supreme Government. In view of the diminished responsibilities of the Local Governments, suggestions were made for the abolition, or reduction in the strength, of the Governor's Councils and the appointment of Lieutenant Governors in the place of Governors.<sup>47</sup>

The Joint Proposals of 1830 put forward by the Governor General in Council and the judges of the Supreme Court at Calcutta did not envisage the complete withdrawal of the legislative powers of the subordinate Governments. They

<sup>47</sup> The members of the Civil Finance Committee were Holt Mackenzie from Bengal, David Hill from Madras and John Bax from Bombay. The members of Lord Bentinck's Council were Lord Dalhousie (Commander in Chief), Charles Metcalfe and W. B. Bayley. Their views on the subject were various. Mackenzie, Metcalfe and Bayley were advocates of very rigid control. According to Mackenzie, the Local Governments were to have no more discretion "in the matter of legislation (including in the term all general instructions affecting the rights of the people), military arrangements, the adjustment or creation of political relations, the institution of new offices, the employment of new establishments, or the disbursement of the public money, than is given to the Residents at Delhi or Indore". While he was one with the others as "to the expediency of a more effective control in the Supreme Government over the other Presidencies", Bentinck stressed that there should be no minute interference. "The interference", he wrote, "should be rather of check, of a preventive and of restraining, than of an active and meddling character. The Supreme Government should come in aid, and not in supersession of the Home authority." As regards reorganisation of the administrations, Mackenzie, Metcalfe and Bayley favoured the division of Bengal into two Presidencies, and these and the old Presidencies of Bombay and Madras were to be administered by Lieutenant Governors unaided by Councils. Hill and Bax wanted each of the three old Presidencies to have a Governor and two Councillors (in place of the existing three), and Bax wanted the Upper Provinces of Bengal to be placed under a Lieutenant Governor.

were to be empowered to consider and enact laws as before, but no law enacted by them was to have any force or effect until it was confirmed by the Legislative Council of Bengal. To ensure that the process of confirmation was not reduced to a mere formality, it was proposed that the same forms of procedure should be adopted in their consideration as in respect of Bills originating, in the Bengal Council. Further, while the Legislative Councils of Madras and Bombay were to have jurisdiction in respect of their respective provinces only, the Bengal Council was to have authority to legislate for the Presidency of Bengal as well as for the other Presidencies.<sup>48</sup>

In the evidence tendered before the Select Committees of Parliament, there was good support for the enhancement of the powers of the Supreme Government over the subordinate Presidencies and for relieving it of responsibility for the local administration of the Bengal Presidency. Mountstuart Elphinstone was one of the few who cautioned against too much of centralisation; he would rather "increase the obstructions to the Governor General's discretion, by depriving him of all

Bentinck wanted the Supreme Council to have a member from each of the three Presidencies and the capital of the Supreme Government was to be located at Allahabad. The administration of the Lower Provinces was to be entrusted to two "Resident" Councillors, but the administration of the whole of the Bengal Presidency was to be vested in the Governor General in Council. There was greater unanimity as regards legislation. The members of the Civil Finance Committee and the Governor General's Council, excepting Lord Dalhousie, were in favour of the Supreme Government legislating for the whole of British India. Dalhousie wanted the British Parliament to legislate for India, the Company's Governments in India being vested with only subordinate rule-making powers. Letter from the Calcutta Finance Committee, 2 August 1830, and Minutes by Hill (16 June 1830), Mackenzie (20 July 1830), and Bax (2 August 1830), Metcalfe (18 October 1830), Bayley (2 November 1830), Bentinck (14 September 1831) and Dalhousie (27 September 1831): Parl. Papers, H. C. No. 418 of 1833, pp. 2, 4, 11, 32, 40, 45, 52, 57 respectively.

<sup>48</sup> Letter in the Territorial Department from the Governor General in Council to the Court of Directors, 14 October (No. 4) 1830, Parl. Papers, H. C. No. 320 E of 1831, p. 104. Heads of Bill (as revised) enclosed with letter from the Judges of the Supreme Court to the Governor General in Council, 13 October 1830, *ibid.*, pp. 153-7.

interference in the internal affairs of the other Presidencies, except a veto on general changes proposed by the subordinate Governments".<sup>49</sup> The proposal to centralise legislative authority in respect of the whole of British India had, perhaps, the largest amount of support.<sup>50</sup> Even those who opposed the move only suggested greater control over, instead of the supersession of, the legislative authority hitherto exercised by the subordinate Presidencies.<sup>51</sup>

The Whig Government in England was in general agreement with the view that the hands of the Supreme Government in India should be greatly strengthened; it was to have "a more defined and efficient", "a precedent and preventive, in place of a subsequent and corrective", control over the subordinate Presidencies.<sup>52</sup> To secure this object, under the terms of the Bill as drawn up by the British Government, the Governor General in Council was made the only authority to legislate in respect of the whole of the Company's territories in India. His previous sanction was to be obtained by the subordinate Governments for creating any new office, or granting any salary, gratuity or allowance. Centralised legislation and checks on expenditure were to be the chief means by which effective control over all aspects of administration was to be obtained. To relieve the Governor General in Council of the burden of local charges and to enable him to discharge his duties of supervision and control better, it was proposed to create a new Presidency of Agra, and also to vest the administration of the Lower Provinces in a Deputy Governor,

<sup>49</sup> Parl. Papers, H. C. No. 735 VI of 1831-32, Appendix 16, p. 157.

<sup>50</sup> Report of the Select Committee on the affairs of the East India Company, Parl. Papers, H. C. No. 734 of 1831-32, p. 20. Also, evidence of James Mill, Parl. Papers, H. C. No. 735 I of 1831-32, Q. 343, 345 & 351; J. Sullivan, *ibid.*, Q. 616; and A. D. Campbell, *ibid.*, Q. 1566.

<sup>51</sup> Evidence of N. B. Edmonstone, Parl. Papers, H. C. No. 735 I of 1831-32, Q. 1729-30. Peter Auber was content with maintaining the existing system with minor changes. *Ibid.*, Q. 1540.

<sup>52</sup> Summary of the main provisions of the Bill as communicated by Charles Grant to the Chairman and Deputy Chairman of the Court of Directors in his letter dated 24 June 1833, Parl. Papers, H. C. No. 549 of 1833, p. 28. Also, his speech in the House of Commons on 13 June 1833, Hansard (III Series), Vol. XVIII, pp. 727-9.

who was to be one of the ordinary members of the Governor General's Council. Consequent upon the diminished responsibilities of the subordinate Governments as a result of these changes, their administration was to be vested uniformly in Governors alone without the aid of Councils. The British Government's original idea was that the decision to abolish the Councils should be firm and final. But, as a concession to those who doubted the wisdom of this policy, a provision was made in the Bill for the Court of Directors, with the approval of the Board of Control, to re-establish the Councils at a later date, if the new system was found to be unsatisfactory.<sup>53</sup>

The Court of Directors was strongly opposed to this move towards centralisation in all its detail. It did not favour the constitution of the Upper Provinces into a full-fledged Presidency and felt that the creation of a Lieutenant Governorship was all that was necessary. It was also opposed to the abolition of the Governors' Councils, and was equally firm against centralised legislation and the increased financial powers proposed to be given to the Supreme Government. It was of the opinion that the record of the Bengal Government in respect of expenditure was no better than that of the other Presidencies, and, therefore, was not sanguine about the benefits expected from the change. Moreover, it was afraid that the enhanced authority of the Governor General in Council would definitely tend to lessen its own authority over the Governments in India, and, if its control was not relaxed, the only effect of the change would be to extend red-tape.<sup>54</sup> The views of the Court of Directors found powerful support

<sup>53</sup> Charles Grant's letter to the Chairman and Deputy Chairman of the Court of Directors, 24 and 27 June 1833, Parl. Papers, H. C. No. 549 of 1833. Also, ss. 55 & 56 of the original Bill, Parl. Papers, H. C. No. 451 of 1833.

<sup>54</sup> Letter from the Chairman and Deputy Chairman of the Court of Directors to C. Grant, 2 July 1833, and Paper of Observations on several clauses of the East India Bill approved by the whole Court, 9 July 1833, Parl. Papers, H. C. No. 549 of 1833, pp. 55 & 64. Powerful minutes opposing the Government's proposals were recorded by two members of the Court, Henry St. George Tucker on 2 July and Richard Jenkins, on 5 July 1833. Parl. Papers, H. L. No. 156 of 1833, pp. 6-19.

in Parliament from the Duke of Wellington<sup>55</sup> and Lord Ellenborough<sup>56</sup> in the House of Lords, and Charles W. W. Wynne in the House of Commons.<sup>57</sup> The only concession that the British Government made was to retain the Governors' Councils for the time being, leaving the question of their abolition to the future decision of the Court of Directors and the Board of Control.<sup>58</sup>

Thus, under the Charter Bill as finally enacted, "the Governor General of India in Council", as the Governor General and his counsellors were now styled, secured effective control over the whole sphere of provincial administration through the financial powers conferred on him.<sup>59</sup> He was also vested with the sole authority to legislate for the whole of British India<sup>60</sup> and to make Articles of War governing the native officers and soldiers in the military service of the Company.<sup>61</sup> The only powers conferred upon the subordinate Governments by the Act were twofold. They could make or suspend laws "in cases of urgent necessity (the burthen of the proof whereof shall be on such Governor or Governor in Council), and then only until the decision of the Governor General of India in Council shall be signified thereon".<sup>62</sup> They were also empowered to propose for the consideration of the Governor General in Council such drafts of laws as they considered expedient, together with the reasons for proposing the same, and the latter was required to take them into consideration.<sup>63</sup>

### *Legislative Council and the Law Commission*

The location of legislative authority being thus determined, the next problem was that of the composition of the Council for purposes of legislation. In this connection, the

<sup>55</sup> Hansard (III Series), Vol. XIX, p. 203, and Vol. XX, p. 323.

<sup>56</sup> *Ibid.*, Vol. XIX, pp. 187 & 313.

<sup>57</sup> *Ibid.*, Vol. XVIII, p. 750, and Vol. XIX, pp. 543-4.

<sup>58</sup> The change was effected on the motion of the Marquis of Lansdowne on 7 August 1833. Also, 3 & 4 Wm. IV, c. 85, ss. 56-7.

<sup>59</sup> 3 & 4 Wm. IV, c. 85, s. 59.

<sup>60</sup> *Ibid.*, s. 43.

<sup>62</sup> *Ibid.*, s. 59.

<sup>61</sup> *Ibid.*, s. 73.

<sup>63</sup> *Ibid.*, s. 66.

first question to be considered was the future of the veto over legislation vested in the Supreme Courts. Apart from the natural reluctance of the judges of these Courts to part with the power vested in them for so long, Englishmen resident in India were not likely to be happy over any measure that would weaken their authority. But there was no support from any quarter to the continuance of the veto in the form it stood. It was generally held that the system had long outlived whatever usefulness it might have had when it was first instituted. But no solution that ignored the judges of the Supreme Courts, it was feared, had any chance of being accepted, and thoughts flowed through old, familiar channels. In a letter to the judges of the Supreme Court at Calcutta, Lord Bentinck and his Council expressed the view, "In the present circumstances of the country, there seems to be no element for a Legislature, excepting the Government and His Majesty's Courts, and it seems to us that the *concurrence of both is for a variety of reasons highly desirable*."<sup>61</sup> "We should anticipate", they added, "a very great benefit from a change by which the judges of your Court would be constitutionally empowered and authorised to afford us the full benefit of your experience and legal knowledge, and by which they would, equally with the members of the Government, have a voice in regard to the expediency of all proposed laws, instead of being confined, as now, to a decision on the question of their repugnance or otherwise to English law, after the Government has committed itself by their enactment."<sup>62</sup> The solution was quite simple: open conflicts between the two bodies which were bringing the Government into disrepute were to be avoided by having their members sit together as one body for the purpose of forging laws. The scheme was in essence the same as had been proposed by Warren Hastings

<sup>61</sup> *Italicised by the author.*

<sup>62</sup> Letter from the Governor General in Council to the judges of the Supreme Court at Calcutta, 14 July 1829, Parl. Papers, H. C. No. 320 E of 1831, p. 9. From the minute of Sir E. Ryan, a puisne judge of the Court, dated 2 October 1829, it appears that the Court claimed the right to adjudge the legality as well as the expediency of the measures submitted to it for registration. He wrote, "It is true that on regulations to

and Barwell on an earlier occasion<sup>66</sup> and was turned down then.

The judges of the Supreme Court at Calcutta were very much in favour of the proposal. But the participation of the judges in the work of legislation was open to one serious objection; it violated the principle of separation of legislative and judicial powers. Sir Edward Ryan admitted that the proposal was not "free from many and weighty objections", but supported it on the ground that there were no other elements in India which could be included in the legislative body.<sup>67</sup> Sir J. Franks justified his support to the proposal with the remark, "That proposed is not an union of the entire legislature with the entire judiciary; that proposed would give participation in the legislative to the judicial, without giving judicial to the legislative; a voice to the judicial, not a will to the legislative."<sup>68</sup> Sir C. E. Grey argued that the suggestion was by no means novel or without precedent, that under certain recent Acts of Parliament, judges were members of Parliaments in Canada, Ceylon, New South Wales and the Cape of Good Hope, and that indeed the principle of separation was not strictly observed even under the British constitution. He further gave it as his opinion that the Regulations to be registered in the Supreme Courts should be passed at a Council "at which they [the judges] or some other persons appointed by the Crown or Parliament should assist", and the judges should have "the power of preventing the Council from passing Regulations incompatible

be registered under the 13th of Geo. III, the judges of the Supreme Court are now called upon to decide upon their expediency as well as their legality; such is the construction which the late Sir Edward West, the present Chief Justice of this Court, and other judges, with whom I entirely concur, have put on this clause; and certainly the task at present imposed upon us is much more difficult, where the regulation is presented for registering without our having any previous knowledge of the reasons and grounds on which the Government may have thought fit to propose it, than it would be if we were constitutionally entitled to know their views and objects." *Ibid.*, p. 98.

<sup>66</sup> See Chapter I, note 16, above.

<sup>67</sup> Minute by Sir E. Ryan, 2 October 1829, Parl. Papers, H. C. No. 320 E of 1831, p. 99.

<sup>68</sup> Minute by Sir J. Franks, 23 September 1829, *ibid.*, p. 51.



with the basis of any law which, as judges, they might afterwards have to administer".<sup>69</sup>

While it was agreed generally that the members of Government and the judges of the Supreme Court should be members of the Legislature constituted at the different Presidencies, there was a difference of opinion as to the other elements to be included in it. During the discussions, Sir C. E. Grey suggested that it should be composed of "existing or former judges of the Supreme Court or some other English lawyers, in fact and not in name only selected by the Crown, Bishop of Calcutta, one or more civil servants learned in native laws, and a merchant or a planter of British descent", but he ruled out the inclusion of Indians "for a time beyond the foresight of man".<sup>70</sup> Lord Bentinck did not agree to the inclusion of any of the other elements mentioned by Grey. With regard to the inclusion of British merchants in India, he thought that it would not add "to the weight of the Council or the confidence of the public". "If any addition were made", he observed, "to the existing established authorities which I consider for the present to be inexpedient, I should infinitely prefer native gentlemen, whose rank in society and great wealth seem to entitle them to distinction; while the Council itself would derive from their knowledge of the character, manners, and feelings of the natives, that information which the most experienced Europeans so imperfectly possess."<sup>71</sup>

The Joint Proposals, as finally agreed to and transmitted to the authorities in England,<sup>72</sup> were as follows: The Legis-

<sup>69</sup> Minute by Sir C. E. Grey, 2 October 1829, *ibid.*, pp. 54-5.

<sup>70</sup> *Ibid.*, p. 56.

<sup>71</sup> Minute dated 10 October 1829, *ibid.*, p. 101. While in 1829 Bentinck's support for the inclusion of Indians was guarded, in his minute of 20 January 1834 on the new India Bill, he expressed his deep regret at "the total exclusion of the natives". Secret Dep. Pros., 29 January 1834, No. 1.

<sup>72</sup> The heads of the proposed Bill were first drafted at a joint meeting of the members of the Council and the judges, and there was almost complete agreement between the two. Letters from the judges of the Supreme Court at Calcutta to the Governor General in Council,

lative Council at each of the three Presidencies was to be composed of members of the Council of the Governor General or the Governor, judges of the Supreme Court, and such other persons as were appointed by His Majesty or by the Court of Directors with the assent of His Majesty.<sup>73</sup> If any two of the judges or one, if only one was present, opined that a proposed law was *ultra vires* of the powers of the Council, the progress of the measure was to be suspended and a reference made on the issue of constitutionality to His Majesty in Council. If the Governor General was of opinion that the grounds of such opposition had no sufficient foundation or that "the urgent necessity of the case and the public safety" required it, and provided also the measure had otherwise the approval of the Council, he could, on his individual responsibility, order the measure to take effect immediately and be in force for a period of 18 months or until the pleasure of His Majesty in Council was known.<sup>74</sup> The laws passed by the Council were to be submitted to the Court of Directors and the Board of Control, and the President of the Board of Control could order their repeal within a year. Before a measure was finally passed into law, adequate publicity was to be given to it, and any petitions or objections received were to be considered, unless the Governor General was of opinion that to allow any such interval would result "in serious mischief to the interests of the British nation". The measures

13 September and 13 October 1830, Parl. Papers, H. C. No. 320 E of 1831, pp. 105, 152.

<sup>73</sup> In forwarding the proposals to the Court of Directors, the Governor General in Council observed, "Besides the members of the Supreme Council, and the judges of the Supreme Court, we are not prepared to hazard an opinion as to what individuals should be admitted into the Legislative Council, or from what classes and on what principles the selections should be made." Letter to Court (Territorial Department), 14 October (No. 4) 1830, *ibid.*, p. 104. The Calcutta judges were of the view that the persons who sat on the Court of Appeal, which they recommended to be constituted to hear appeals from the Supreme Courts and the Sadr Courts, should not be members of the Legislative Council. Letter from the judges of the Supreme Court at Calcutta to the Secretary of the Board of Commissioners for the Affairs of India, 16 October 1830, *ibid.*, p. 185.

<sup>74</sup> This provision was added at the instance of the Governor General

passed by the Councils at Bombay and Madras were to be confirmed by the Council for Bengal before they became law.<sup>75</sup> Although the necessity for extensive reforms in the system of law and judicature, including codification of laws, was stressed in the correspondence,<sup>76</sup> no separate machinery to aid the Councils was recommended; it was for the new Councils themselves to take such action as they deemed necessary.

His Majesty's Government was greatly influenced by these proposals in drawing up the Charter Bill.<sup>77</sup> But it did not favour their principal recommendation that the judges of the Supreme Court should be members of the Legislative Council, obviously because of the traditional aversion to do anything that was likely to affect the independence and impartiality of the judiciary. There was not much support for the inclusion of any other element in the Council. The Joint Proposals had only recommended the addition of some persons to be appointed from England, giving no indication as to the basis on which the selection was to be made. His Majesty's Government considered it desirable to appoint one or two persons from England, "either barristers of high standing or judges who had retired from office and who would bring the light of their knowledge to assist in carrying into effect these important

in Council. Letter from the Governor General in Council to the judges of the Supreme Court at Calcutta, 28 September 1830, *ibid.*, pp. 141-2. Peter Auber, in his evidence before the Select Committee of Parliament, pithily observed that, under the proposals, while the Supreme Court tried to assert its supremacy, the Governor General in Council wanted the Government to be supreme. Parl. Papers, H. C. No. 735 I of 1831-32, Q. 1351.

<sup>75</sup> Heads of Bill, as revised, Parl. Papers, H. C. No. 320 E of 1831, p. 153.

<sup>76</sup> See, in particular, "Some Observations on a Suggestion by the Governor General in Council as to the formation of a Code of Laws for the British Territories in the East Indies" submitted by Sir C. E. Grey and Sir E. Ryan, *ibid.*, p. 111.

<sup>77</sup> It appears that the Court of Directors wilfully held back from the Board of Control the correspondence between the judges and the Government of India on the subject of legislative council, and Sir Edward Ryan was instrumental in bringing the question before Grant, the President of the Board. Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), pp. 180 & 189.

alterations in the law".<sup>78</sup> The Charter Bill as first introduced in Parliament increased the strength of the ordinary members of the Governor General's Council from three to five: four of them were to be appointed by the Court of Directors from among the Company's servants of ten years' standing, and the fifth member was to be appointed from among persons outside the Company's service by the Court of Directors, subject to the assent of His Majesty. No legal qualification was attached to the office of the fifth member, although the intention was to appoint a lawyer. The composition of the Council, as provided in the Bill, was the same both for executive and legislative purposes. Provision was also made for setting up a Law Commission, composed of not more than five members and working under the direction and control of the Governor General in Council. It was to aid with its enquiries and reports in the great task of reforming the legal and judicial system of India. The Governor General in Council was to issue commissions to such persons as were recommended by the Court of Directors, with the assent of the Board of Control, to form the commission. If any seat or seats remained unfilled after such appointments had been made, they could be filled, if necessary, by the Governor General in Council acting in his discretion.<sup>79</sup>

While such were the views of the authorities in India and of His Majesty's Government, various opinions were expressed on the subject of the composition of the Legislative Council, both inside and outside Parliament. Sir John Malcolm, the late Governor of Bombay, opposed the inclusion of the judges of the Supreme Court or of an English lawyer on the ground that "their education and their whole turn of mind would be at variance with many parts of the established system and the changes they would seek must be with a leaning to the

<sup>78</sup> Speech by Charles Grant in the House of Commons, 13 June 1833, Hansard (III Series), Vol. XVIII, p. 736.

<sup>79</sup> Sections 50-1 of the original Bill, Parl. Papers, H. C. No. 451 of 1833. Also, Summary of the main provisions of the Bill communicated by C. Grant to the Chairman and Deputy Chairman of the Court of Directors in his letter dated 24 June 1833, Parl. Papers, H. C. No. 549 of 1833, pp. 28-30.

extension of the forms and principles of the law they best understand", and he preferred instead the inclusion of the Advocate General, who would have become by residence in India divested of "some of his English prejudices".<sup>80</sup> James Mill was opposed to the inclusion of judges on principle. But, he wanted the inclusion of an English lawyer, and also "a man capable of bringing to the great work the aid of general principles, . . . in short, a person thoroughly versed in the philosophy of man and of government".<sup>81</sup> Mountstuart Elphinstone referred to his own code in the preparation of which civil servants and persons with judicial experience had aided, but he considered the advantages of the presence of an "English lawyer" "very questionable".<sup>82</sup> The proposal to appoint the judges of the Supreme Court as members of the Legislative Council received support from Holt Mackenzie,<sup>83</sup> David Hill,<sup>84</sup> Thomas Fortesque,<sup>85</sup> Richard Clarke,<sup>86</sup> John Sullivan,<sup>87</sup> W.L. Melville<sup>88</sup> and A. Ross.<sup>89</sup> The suggestion to include some persons from outside the Company's service, Europeans and Indians, had the support of Holt Mackenzie.<sup>90</sup> James Silk Buckingham considered such representation desirable "in order to make a beginning, at least, of that system of self-government to which they ought to advance all our Colonies as far as possible".<sup>91</sup> Sir Alexander Johnstone, retired Chief Justice of Ceylon and First Member of the High Court of Appeal and President of His Majesty's Council, in his evidence

<sup>80</sup> Sir John Malcolm, *The Government of India* (London, 1833), pp. 170-2. His minute on the proposed changes, 10 November 1830, Parl. Papers, H. C. No. 735 IV of 1831-32, Appendix IV, p. 516.

<sup>81</sup> Parl. Papers, H. C. No. 735 I of 1831-32, Q. 348.

<sup>82</sup> Parl. Papers, H. C. No. 735 VI of 1831-32, p. 157.

<sup>83</sup> Parl. Papers, H. C. No. 735 I of 1831-32, Q. 822-3.

<sup>84</sup> Parl. Papers, H. C. No. 735 IV of 1831-32, Q. 354-60.

<sup>85</sup> *Ibid.*, Q. 986.

<sup>86</sup> *Ibid.*, Q. 113-5.

<sup>87</sup> Parl. Papers, H. C. No. 735 I of 1831-32, Q. 617.

<sup>88</sup> Parl. Papers, H. C. No. 735 IV of 1831-32, Q. 690-4 & 698-9.

<sup>89</sup> Parl. Papers, H. C. No. 320 E of 1831, p. 41.

<sup>90</sup> Parl. Papers, H. C. No. 735 I of 1831-32, Q. 816, 822-3 & 841.

<sup>91</sup> Speech on 26 July 1833 in the House of Commons, Hansard (III Series), Vol. XX, 1833, p. 27.

before the Select Committee of Parliament, put forward a powerful plea for the inclusion of Indians "as the surest way of rendering those Councils efficient, popular, and beneficial to the natives of the country", and cited the experience of Ceylon to support his view.<sup>92</sup> Sir John Malcolm recommended the association of Indians in the work of legislation through consultative committees.<sup>93</sup> James Mill, the high priest of the Utilitarians considered the introduction of democratic institutions, or anything approaching to representation, as entirely out of the question in the existing state of Indian society. But he was in favour of the inclusion of an Indian member in the small body of legislators he proposed. He wrote, "I am induced by all that I understand of the native character to think that such a person, if judiciously chosen, might be useful in suggesting things likely to escape a European, and in preventing rules which might run counter to the feelings of the natives; without his being found troublesome by pertinacity in his own opinions, compliance, I think, would be more likely to be the general habit of any native chosen."<sup>94</sup> Some opinions were expressed against the inclusion of Indian members in the legislative body.<sup>95</sup> Ram Mohan Roy only suggested circulation of draft laws among officials and leading citizens.<sup>96</sup> On the whole, the subject of representation of Indians evoked little interest.

<sup>92</sup> Evidence tendered on 6 and 9 July 1832, Parl. Papers, H. C. No. 735 IV of 1831-32, Q. 1130-3.

<sup>93</sup> Malcolm wrote, "There is no branch of our administration in which that minute knowledge they [Indians] possess of their own laws and usages, as well as the general character of the population, could be of more use than in the execution of such a task, and I am satisfied many serious errors may be avoided by their employment." Sir John Malcolm, *The Government of India* (London, 1833), p. 170.

<sup>94</sup> Parl. Papers, H. C. No. 735 I of 1831-32, Q. 348, 352, 364, 372. Also Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), pp. 65, 68.

<sup>95</sup> Evidence of Sir Richard Clarke, Parl. Papers, H. C. No. 735 IV of 1831-32, Q. 116.

<sup>96</sup> Parl. Papers, H. C. No. 320 A of 1831, p. 738. Ram Mohan Roy's general approach was quite cautious. Writing in 1832 from England to a friend in India, he observed, "I must at the same time confess that the progress we have made in India as to knowledge or politics is by no means equal to that made here by the English; I therefore beg to observe

The urgency of the need for codification and legal reform, as pointed out earlier, was generally accepted, both in India and England. The proposal had many supporters among those who tendered evidence before the Select Committee of Parliament,<sup>97</sup> and in Parliament it found a powerful exponent in Macaulay<sup>98</sup> and modest supporters in Charles Grant and the Marquis of Lansdowne.<sup>99</sup> There were, however, many who doubted the wisdom of the policy under the existing conditions of the country. Mountstuart Elphinstone was anxious that this should not lead to wholesale introduction of English law into the country.<sup>100</sup> Sir John Malcolm was sharply critical of the general approach of the reformist school, but he admitted the need for simplification of laws and reduction in their volume, and would welcome something on the lines of "the condensed and clear code of civil and criminal law now in force at Bombay".<sup>101</sup> The Court of Directors was opposed to the proposal,<sup>102</sup> and the Duke of Wellington<sup>103</sup> and Lord

that moderation and prudence should not be lost sight of by our countrymen. We should not be too hasty and too sanguine in raising our condition, since gradual improvements are most durable." J. K. Majumdar, *Indian Speeches and Documents on British Rule, 1821-1928* (London, 1937), p. 48.

<sup>97</sup> Evidence of Sir Alexander Johnstone, Parl. Papers, H. C. No. 735 IV of 1831-32, pp. 147-50; Thomas Fortseque, *ibid.*, Q. 970-1 & 936; Holt Mackenzie, *ibid.*, Q. 183; James Mill, *ibid.*, Q. 1060-1; and Raja Ram Mohan Roy, Parl. Papers, H. C. No. 320 A of 1831, p. 738.

<sup>98</sup> Hansard (III Series), Vol. XIX, pp. 530-3.

<sup>99</sup> *Ibid.*, Vol. XVIII, p. 739, and Vol. XIX, p. 172.

<sup>100</sup> Parl. Papers, H. C. No. 735 VI of 1831-32, p. 157.

<sup>101</sup> Sir John Malcolm, *The Government of India* (London, 1833), pp. 167-175. See also evidence of N. B. Edmonstone, Parl. Papers, H. C. No. 735 I of 1831-32, Q. 1726-7.

<sup>102</sup> "With regard to a Commission of Inquiry with a view to the formation of an uniform system of law, the Court, whilst they by no means object to inquiry, and whilst they admit that uniformity of law is desirable whenever it may be practicable, must be permitted to doubt whether the British Empire in India, embracing a vast population of multiform castes and usages, has yet reached the point at which it may be possible for its foreign rulers to accomplish that desideratum of uniformity of law, which has not yet been found attainable in our own long settled and highly civilised country." Letter from the Chairman and Deputy Chairman of the Court of Directors to C. Grant, 2 July 1833, Parl. Papers, H. C. No. 549 of 1833, pp. 55 & 58.

<sup>103</sup> Hansard (III Series), Vol. XX, p. 323.

Ellenborough<sup>104</sup> spoke against it. As regards the appointment of a special commission to assist the Government in the work of legal reform, a suggestion was made to this effect during the examination of James Mill before the Select Committee of Parliament.<sup>105</sup> But the subject appears to have been insufficiently canvassed before the Government's proposal first appeared in a concrete form in a letter to the Court of Directors on 24 June 1833.<sup>106</sup> The decision to appoint a statutory commission was presumably taken in the light of the working of similar bodies in England, and in view of the great interest evinced by the British Government and Parliament in the subject of Indian law reform.

During the passage of the Charter Bill through Parliament, the Government's proposals regarding the legislative machinery were modified in two respects. Firstly, the number of members to be appointed to the Governor General's Council from among the Company's servants was reduced from four to three,<sup>107</sup> and the person to be appointed from outside the Company's service, originally designated the fifth member, became in consequence the "Fourth Member". Again, if the original proposal of the Government as incorporated in the Charter Bill had remained unaltered, the Fourth Member would have been a full-fledged member of the Council, entitled to participate in equal measure in respect of executive as well as legislative matters. But on a motion by Lord Lansdowne, Lord President of the Council,<sup>108</sup> it was laid down that the

<sup>104</sup> *Ibid.*, Vol. XIX, p. 190, and Vol. XX, p. 314.

<sup>105</sup> Parl. Papers, H. C. No. 735 I of 1831-32, Q. 358-61.

<sup>106</sup> Parl. Papers, H. C. No. 549 of 1833, pp. 28-30.

<sup>107</sup> 3 & 4 Wm. IV, c. 85, s. 40.

<sup>108</sup> Hansard (III Series), Vol. XX, 1833, p. 445. The amendment appears to have been adopted without full realisation of its possible effects, and it gave rise to a major controversy between Macaulay and Bentinck on the nature of relations that was to subsist between the Executive and the Legislature. Seeking an explanation as to the scope and meaning of the provision, Macaulay observed, "As I was a member of the House of Commons and Secretary to the Commissioners for the Affairs of India during the year 1833, I should have been inexcusable if I had not given the closest attention to the provisions of the Act . . . I hope that in my own vindication and without the least disrespect to any branch of the Legislature, I may be permitted to mention what is now a matter of history that



Fourth Member should not be "entitled to sit or vote in the said Council except at meetings thereof for making laws and regulations".<sup>109</sup> The object was manifestly, in the words of the Court of Directors, "that the whole of his time and attention, and all the resources of knowledge or ability which he may possess, should be employed in promoting the due discharge of the legislative functions of the Government".<sup>110</sup> Although the intention of the Government was clearly to appoint a lawyer to the post, no such qualification was laid down in the Act, and the provision was elastic enough to permit the appointment of any other person from outside the Company's service.<sup>111</sup> However, the Fourth Member came to be generally spoken of as the Legislative or Legal Member. Under the terms of the Charter Act, he was also permanently the junior-most member of the Council.

*Special Powers of the Governor General  
in respect of Legislation*

The Governor General's Council, constituted in the manner described above, was made responsible to legislate for the

the words of which I desire to have an explanation were not in the Bill when it passed the House of Commons, but were added at a very late stage, I think, on the third reading, in the House of Lords." Ootacamund Pol. Pros., 9 August 1834, No. 7.

<sup>109</sup> 3 & 4 Wm. IV, c. 85, s. 40.

<sup>110</sup> Public Letter from Court, 10 December (No. 44) 1834, para. 21.

<sup>111</sup> In 1850, J.E.D. Bethune, Fourth Member in Lord Dalhousie's Council, contended that the object of the appointment was not, as was "sometimes assumed", only "to secure the services of an English lawyer". Adverting to the absence of any such restriction in the Statute, he said that, in his view, "the special end of his appointment was clearly in order that one person might be added to the Governor General's Council thoroughly free from the influence of habits of thought acquired by a life spent in India, and the Indian statesmen might hear, during the deliberations, how the questions under their consideration, were likely to be viewed by those conversant with the administration of public affairs in England." Leg. Dep. Pros., 19 July 1850, No. 3. There is not much support for this view in the papers of the time. While the provision was elastic enough to meet other contingencies, the immediate object of the British Government was clearly to appoint a lawyer.

whole of British India. If the practice hitherto prevalent were allowed to continue, the Council would have functioned strictly as a board, decisions being reached by majority vote; the special powers of the Governor General to overrule his Council would not have extended to legislative matters or to the imposition of any tax or duty.<sup>112</sup> There was little demand for any change in this respect, and the Charter Bill as first introduced in Parliament proposed no modification.<sup>113</sup> During the passage of the Bill through Parliament, however, the subject cropped up in connection with the arrangements to be made for the administration of the country whenever the Governor General was away from the Presidency, on tour, unaccompanied by his Council. In the executive sphere, the Council presided over by the senior-most member was to carry on the administration, exercising all the powers of the Government, but it was considered highly inexpedient to divest the Governor General of all his authority. The Charter Act, therefore, empowered the Governor General in Council to authorise by law "the Governor General alone to exercise all or any of the powers which might be exercised by the Governor General in Council on such occasions".<sup>114</sup> There could, however, be no such delegation of authority to the Governor General in respect of legislation, for it was a long-accepted principle of Indian administration that law-making was too serious a matter to be entrusted safely to one individual. The Council at Calcutta was to be at all times solely responsible for legislation. But, as a safeguard against precipitate legislation, it was provided in the Charter Bill, during the report stage, "that during the absence of the Governor General, no law or regulation shall be made without the assent in writing of the said Governor General".<sup>115</sup> The main object

<sup>112</sup> 26 Geo. III, c. 16, and 33 Geo. III, c. 52, ss. 47-51.

<sup>113</sup> Holt Mackenzie suggested that, if an enlarged Legislative Council was set up, the Governor General should be vested with overriding powers. Parl. Papers, H. C. No. 735 I of 1831-32, Q. 819.

<sup>114</sup> 3 & 4 Wm. IV, c. 85, s. 70.

<sup>115</sup> S. 69 of the original Bill, Parl. Papers, H. C. No. 451 of 1833. S. 67 of the Bill as amended on report, Parl. Papers, H. C. No. 558 of 1833.

of the provision was that the Council and the Governor General should act in concurrence with one another in this all-important field, and any differences between the two should be resolved in the normal course after the Governor General rejoined his Council. The effect of this arrangement, which was finally adopted,<sup>116</sup> was to extend the personal authority of the Governor General in legislative matters. While hitherto he had no power of veto over any law or regulation passed by a majority of the Council, he was now vested with this power on all occasions when he was separated from his Council.

### *Scope of the Legislative Authority of the Council*

The limitations of the authority conferred on the Governments in India before 1833 in this respect have been explained in the previous Chapter.<sup>117</sup> In the discussions leading to the Joint Proposals of the members of the Governor General's Council and the judges of the Supreme Court, there was a clear recognition of the fact that Parliament was not in a position to legislate directly for the day-to-day needs of India, and it was "of the most urgent expediency to have in this country an authority legally competent to legislate for all classes and all persons subject to the political authority of the East India Company"<sup>118</sup> without being subject to undue restrictions. Hence it was recommended that the Presidency Governments in India should have plenary powers of legislation, subject only to the following limitations: "It shall not

<sup>116</sup> 3 & 4 Wm. IV, c. 85, s. 70. Referring to the position before the passing of the Charter Act of 1853, A. B. Keith states incorrectly, "In legislative business three councillors could legislate in his [Governor General's] absence and he could not override them." *A Constitutional History of India, 1600-1935* (London, 1937), p. 138.

<sup>117</sup> See pp. 16-17 above.

<sup>118</sup> Letter from the Governor General in Council to the judges of the Supreme Court at Calcutta, 14 July 1829, and minutes of Sir Charles Grey and Sir Edward Ryan, both dated 2 October 1829. *Parl. Papers*, H. C. No. 320 E of 1831, pp. 9, 54 & 98. Also, evidence of James Mill and J. Sullivan, *Parl. Papers*, H. C. No. 735 I of 1831-32, Q. 345-6 & 615 respectively.

be lawful for any of the said Legislative Councils to make any law or regulation which shall in any way repeal, vary, suspend or affect any Act of the Imperial Parliament, nor any Letters of Patent of the Crown, nor in any way affect any prerogative of the Crown or authority of Parliament, nor the constitution or rights of the East India Company, nor any part of the unwritten law or constitution of the realm of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the said Crown over any part of the British territories in the East Indies."<sup>119</sup> There was not much opposition in England to the extension of the legislative authority of the Government of India<sup>120</sup> and placing it on a sound footing. His Majesty's Government embodied the recommendations of the Indian authorities in the Charter Act, except in one important respect. The Joint Proposals had expressly provided that laws enacted in India should in no way affect or alter any Act of Parliament, and this limitation was quite extensive. Parliament had legislated specifically for India on a variety of topics, particularly in respect of the King's Courts, the administration of the Presidency towns, and the European British subjects resident in India. Further, English law as it stood in 1726 was held to apply in its entirety to the Presidency towns and European British subjects, and a good part of it was based on Parliamentary statutes. If all the Acts of Parliament had been exempted as was suggested, the authority of the Government of India would have been severely curtailed, particularly in a sphere in which reform was considered most necessary. Further, since there was considerable uncertainty as to what laws of Parliament extended to India, the scope of the authority of the Indian legislature in this respect would have been in doubt and thus a perennial source of dispute. His Majesty's Government went far beyond the recommendations

<sup>119</sup> Item 8 of Heads of Bill, as revised, Parl. Papers, H. C. No. 320 E of 1831, p. 156.

<sup>120</sup> Lord Ellenborough opposed the extension of authority in respect of European British subjects and the Supreme Courts. Hansard (III Series), Vol. XIX, p. 189.

of the Indian authorities, and the Charter Act left the Government of India free to repeal any *past* act of Parliament applicable to India excepting "the provisions of the Acts for punishing mutiny and desertion of officers and soldiers, whether in the service of His Majesty or the said Company".<sup>121</sup> The new Charter Act and all future legislation in respect of the Company and its territories were expressly exempted, and the Government of India could not make any laws affecting them.

### *Control over Legislation by the Court of Directors*

The next question for consideration was the extent to which superior control over the legislative activities of the Government of India was to be provided. In the view of His Majesty's Government, there had been too much interference in the past with the details of Indian administration, and in future the control was to be limited "to cases of a strong and extraordinary nature or rather to cases of a general nature".<sup>122</sup> "Having once resolved to place confidence in those to whom they delegated the government of India, the confidence must be very large indeed, or otherwise the Government there could not be efficient."<sup>123</sup> It was in this spirit that a strong centralised government with extensive legislative and financial powers was established in India. Hitherto, as regards legislation in India, the Court of Directors had the same wide powers of control as over executive matters. Further, under the Regulating Act of 1773, His Majesty in Council could disallow the Regulations

<sup>121</sup> 3 & 4 Wm. IV, c. 85, s. 43.

<sup>122</sup> Charles Grant's speech in the House of Commons, 13 June 1833, Hansard (III Series), Vol. XVIII, pp. 705-6. There was a proposal from Ram Mohan Roy that ran counter to this view. In his evidence before the Select Committee, he recommended the establishment of a Standing Committee of the House of Commons to review the Regulations issued by the Company's Government in India. The view sometimes expressed that he wanted Parliament to provide directly for the day-to-day legislative needs of the country does not appear to be well-founded. Parl. Papers, H. C. No. 320 A, p. 738. U. N. Ball, *Rammohun Roy* (Calcutta, 1933), p. 290.

<sup>123</sup> Hansard (III Series), Vol. XVIII, pp. 705-6.

issued by the Presidency Governments,<sup>124</sup> and, under the Act of 1781, could disallow as well as amend them.<sup>125</sup> Certain important changes were now introduced by the Charter Act. The power to disallow enactments was shifted from His Majesty in Council to the Court of Directors, subject to the control of the Board of Control; and the Governor General in Council was enjoined to repeal forthwith all laws and Regulations so disallowed.<sup>126</sup> A proposal from the Court of Directors that it should be vested with the power "to alter and amend as well as to disallow"<sup>127</sup> was not accepted by His Majesty's Government. In addition to the grant of this general power of control, the Court of Directors was specially required to lay down, with the assent of the Board of Commissioners, rules of procedure for the meetings of the Governor General in Council, *inter alia* "which rules shall prescribe the modes of promulgation of any laws or regulations" and "of the administration of all acts and proceedings whatsoever of the said Governor General in Council".<sup>128</sup> The previous sanction of the Directors was also made necessary before the Government of India could legislate (a) for conferring on any courts of justice other than the courts of justice established by His Majesty's Charters the power "to sentence to the punishment of death any of His Majesty's natural-born subjects", or for abolishing any of the courts of justice established by His Majesty's Charters<sup>129</sup>; (b) for declaring any place other than those mentioned in the Charter Act as open to European settlement<sup>130</sup>; and (c) for the mitigation or abolition of slavery.<sup>131</sup> The Bill as first introduced in Parliament contained a provision requiring their previous sanction also for laws "imposing any new or additional duty or tax upon the import of any goods, wares or merchandise from the United Kingdom, or any part of the

V 2 - 56, 3<sup>rd</sup> M 61 ← M 34 k 3 52637.  
<sup>124</sup> 13 Geo. III, c. 63, s. 37.

<sup>125</sup> 21 Geo. III, c. 70, s. 23.

<sup>126</sup> 3 & 4 Wm. IV, c. 85, s. 44.

<sup>127</sup> Paper of observations and suggestions on the several clauses of the East India Bill approved by the whole Court on 9 July 1833, Parl. Papers, H. C. No. 549 of 1833, pp. 64-5.

<sup>128</sup> 3 & 4 Wm. IV, c. 85, s. 47.

<sup>129</sup> *Ibid.*, s. 46.

<sup>130</sup> *Ibid.*, s. 83.

<sup>131</sup> *Ibid.*, s. 88.

Dominions of His Majesty, other than the said territory".<sup>122</sup> This provision was, however, dropped at a later stage. In addition to these powers, the Court of Directors claimed and exercised certain powers derived from earlier statutes which had not been repealed, e.g., the power vested in the Court to make regulations governing trade of foreign vessels with India,<sup>123</sup> and the requirement of the previous sanction of the Court and the Board of Control in respect of legislation imposing customs and other taxes in respect of places and persons within the jurisdiction of the Supreme Courts.<sup>124</sup>

### *Special Directives regarding Legislation*

The general scope of the legislative authority vested in the Government of India under the Charter Act and the limitations under which it was to be exercised have been so far considered. In addition, Parliament gave special directions in respect of certain matters to which it attached the highest importance. Of these, the directive relating to legal and judicial reforms is the most important. It is contained in the preamble to the provision for setting up a Law Commission, which runs as follows: "Whereas it is expedient that, subject to such special arrangements as local circumstances may require, a general system of judicial establishments and police, to which all persons whatsoever, as well Europeans as natives, may be subject, should be established in the said territories at an early period, and that such laws as may be applicable in common to all classes of the inhabitants of the said territories, due regard being had to the rights, feelings, and peculiar usages of the people, should be enacted, and that all laws, and customs having the force of law, within the same territories should be ascertained and consolidated, and as occasion may require amended."<sup>125</sup> The periodical reports of the Law Commission and the opinions and resolutions of the Governor General in Council on them were to be laid annually before Parliament.<sup>126</sup>

<sup>122</sup> Section 45 of the Bill, Parl. Papers, H. C. No. 451 of 1833.

<sup>123</sup> 37 Geo. III, c. 117, ss. 1-3.

<sup>124</sup> 53 Geo. III, c. 155, ss. 98-9.

<sup>125</sup> 3 & 4 Wm. IV, c. 85, s. 53.

<sup>126</sup> *Ibid.*, s. 54.

Settlement of British subjects in India was another matter in which Parliament was greatly interested. As explained earlier, His Majesty's Government proceeded on the principle that the existing restrictions should be removed, adequate safeguards being at the same time provided to protect the interests of the natives of the country.<sup>137</sup> Even the Court of Directors, which had all along opposed this move, did not persist in its opposition after the Charter Bill was presented to Parliament.<sup>138</sup> Accordingly, under the Charter Act, "the natural-born subjects of His Majesty" were to be admitted without license to the well-settled regions of the country, namely, the territories acquired by the Company before 1800, the areas ceded by the Nawab of the Carnatic, the province of Cuttack, and the settlements of Singapore and Malacca. There was to be no other restriction on their movements except that of reporting on arrival at port to proper municipal authorities. Admission to other areas of the Company's territories was to be strictly by license as before. If the local conditions permitted, free settlement might be allowed in these areas also by the Governor General in Council, with the previous assent of the Court of Directors and the Board of Control.<sup>139</sup> Further, in the areas wherein they were allowed to reside, European British subjects were permitted to hold lands "for any term of years".<sup>140</sup> This provision, it was made clear, did not in any way restrict the authority of the Governor General in Council to enact laws enabling "any subjects of His Majesty to acquire or hold any lands, or rights, interests or profits in or out of lands, in any part of the said territories, and for any estates or terms whatever".<sup>141</sup>

<sup>137</sup> See pp. 28-33 above.

<sup>138</sup> Letter from the Chairman and Deputy Chairman of the Court of Directors to Charles Grant, 2 July 1833, Parl. Papers, H. C. No. 549 of 1833, p. 55.

<sup>139</sup> 3 & 4 Wm. IV, c. 85, ss. 81-3.

<sup>140</sup> 3 & 4 Wm. IV, c. 85, s. 86. Section 86 of the original Bill provided that lands could be held for 50 years, which was a confirmation of the concession made by the Bengal Government in 1828. Parl. Papers, H. C. No. 451 of 1833. Also, speech by Charles Grant, 13 June 1833, Hansard (III Series), Vol. XVIII, pp. 736-8.

<sup>141</sup> 3 & 4 Wm. IV, c. 85, s. 86.



A number of safeguards were provided in the Charter Act to protect the natives of India from the evil effects of the settlement. The changes effected in the legislative machinery and the project of legal and judicial reforms were themselves some steps in this direction. In addition, the Governor General in Council was directed to enact laws against illicit residence of Europeans and for the protection of the people "from insult and outrage in their persons, religions or opinions".<sup>142</sup> There was great fear that free admission of Englishmen might give birth to a governing caste, acquiring special rights and privileges. To prevent this, it was suggested that there should be a provision laying down that "the laws should be equal in all matters of common concern between native and British subjects for the common good, without favour or disparagement to either".<sup>143</sup> Lord Bentinck strongly objected to the imposition of such a restriction on the authority of the Indian legislature, "because it was one of those generalities of which the particular effects cannot be immediately anticipated, and also because it seems to imply a suspicion of injustice, scarcely consistent with the delegation of powers such as are proposed to be given".<sup>144</sup> While no provision of such a general nature was made in the Charter Act, it provided in Section 87 against discrimination in the matter of employment in the Company's service: "No native of the said territories, nor any natural-born subject of His Majesty resident therein, shall, by reason only of his religion, place of birth, descent, colour, or any of them, be disabled from holding any place, office, or employment under the said Company." Prof. H. H. Dodwell has rightly pointed out that, contrary to the general opinion, "no change was immediately intended in the recruitment to the higher posts, which were to continue to be filled with Englishmen", and the object in view was that "Indians should not find themselves excluded from employment in the subordinate posts which were open to everybody, and which it was feared might be engrossed by

<sup>142</sup> *Ibid.*, ss. 84-5.

<sup>143</sup> Lord Bentinck's minute, 10 October 1829, Parl. Papers, H. C. No. 320 E of 1831, p. 100.

<sup>144</sup> *Ibid.*

men of mixed blood who were becoming numerous".<sup>145</sup> In the absence of qualified Indians, the question of their immediate admission to the higher or covenanted services was not a subject for serious consideration at the time.<sup>146</sup> But the provision clearly held out a promise that, with the expansion of education and the availability of competent men, Indians would be able to enter these services as well. Indeed, while making it clear that the enactment did not propose to "break down or derange the scheme of our Government as conducted principally through the instrumentality of our regular servants, civil and military", and holding out a warning "against the supposition that it is chiefly by holding out means and opportunities of official distinction that we expect our Government to benefit the millions subjected to their authority", the Court of Directors stated, "The meaning of the enactment, we take to be, that there shall be no governing caste in British India; that whatever other tests of qualification may be adopted, distinctions of race or religion shall not be of the number; that no subject of the King, whether of Indian or British, or mixed descent, shall be excluded either from the posts usually conferred on our uncovenanted servants in India, or from the covenanted service itself, provided he be otherwise eligible consistently with the rules, and agreeably to the conditions, observed and exacted in the one case and in the other".<sup>147</sup> These liberal sentiments of the British Government, although they had reference to the future rather than to the present, find further confirmation in the remark of Charles Grant that

<sup>145</sup> "Political activities from Lord William Bentinck's educational policy (1832) to the birth of the Congress Party (1884)" by Prof. Dodwell in Sir John Cumming (Ed.), *Political India, 1832-1932* (London, 1932), p. 27.

<sup>146</sup> Lord Bentinck had already initiated a policy of employing Indians in the uncovenanted service in larger numbers and in positions of greater responsibility.

<sup>147</sup> Public Letter from Court, 10 December (No. 44) 1834, paras 105 and 109. See also speech by T. B. Macaulay, Hansard (III Series), Vol. XIX, pp. 534-6. Eric Stokes observes that the Despatch "toned down the implications of this clause and poured cold water on its warmhearted and liberal sentiments", and it really reflected the mind of James Mill, who did not favour extensive employment of Indians. *The English Utilitarians and India* (Oxford, 1959), pp. 64-5.

there was nothing to prevent a native of British India from holding the post of a member of the Governor General's Council which was to be filled by a person from outside the Company's service.<sup>148</sup> Indians came to regard the provision as a Magna Carta entitling them to hold any of the higher offices without any exception being made, and their view had the support of many progressive Englishmen.<sup>149</sup> But many decades had to pass before an Indian could find admission into the covenanted service.

Finally, Parliament issued also a directive to secure the abolition of slavery in India. The Charter Bill as first introduced in Parliament contained a simple provision providing for the abolition of slavery in India on or before 12 April 1837.<sup>150</sup> But opinion was on the whole against direct Parliamentary enactment; it was felt that the Government of India should instead be directed to take such steps as were necessary to secure the end in view with due regard to the local conditions.<sup>151</sup> Accordingly, the Bill was amended on a motion by Lord Lansdowne<sup>152</sup> leaving the question to be settled in India, but provision was made to ensure that the subject did not suffer from neglect and that reforms were introduced with the concurrence of the authorities in England. Section 88 of the Charter Act directed the Government of India to take into consideration "forthwith" "the means of mitigating the state of slavery, and of ameliorating the condition of slaves, and of extinguishing slavery, throughout the said territories, so soon as such extinction shall be practicable and safe", due regard

<sup>148</sup> Hansard (III Series), Vol. XIX, p. 663.

<sup>149</sup> At the time of the renewal of the Charter in 1853, a number of opinions were expressed that the spirit of the provision had been ignored in practice and the claim of Indians for admission into the higher services had been completely overlooked. Speeches by John Bright and J.F.B. Blackett, Hansard (III Series), Vol. CXXVII, pp. 1184-5 and 1315-16; and L. S. S. O' Malley, *Modern India and the West* (London, 1941), p. 589.

<sup>150</sup> Section 88 of the Bill, Parl. Papers, H. C. No. 451 of 1833.

<sup>151</sup> Paper of observations and suggestions on several clauses of the East India Bill approved by the whole Court on 9 July 1833, Parl. Papers, H. C. No. 549 of 1833, pp. 64-5. Speech by Charles Grant, 13 and 17 June 1833, Hansard (III Series), Vol. XIX, pp. 793 & 798-800.

<sup>152</sup> Hansard (III Series), Vol. XIX, p. 446.

being had "to the laws of marriage and the rights and authorities of fathers and heads of families". The Government of India was further directed to submit every year reports relating to the implementation of the directive, which were to be placed before Parliament, and no measure was to be passed into law without the previous assent of the Court of Directors.

### *The Last Charter on the Anvil*

We have so far described the system of legislation that was instituted by the Charter Act of 1833. The system was subject to many stresses and strains, but the question of amending it in any substantial measure did not come up before Parliament for the next two decades. Only a few changes of comparatively minor importance were effected during the period. The decision to create a full-fledged Presidency of Agra was annulled and a Lieutenant Governorship was created in its place,<sup>163</sup> but this did not in any way affect the legislative system. In 1840 the Government of India was empowered to make laws, regulations and articles of war in respect of the Indian navy, subject to similar restrictions as were imposed on other Indian enactments.<sup>164</sup> The power to frame subsidiary laws was also conferred by a number of Parliamentary statutes, for example, the Act for Marriages in India of 1851 empowering the Government of India to provide by law for matters of detail.<sup>165</sup> The abolition of the Law Commission was a major event of the period, but Parliament was not approached to legislate on the subject.

When the question of the renewal of the Company's Charter came up again for consideration, a fitting opportunity was provided for a general review of the country's constitutional system. In 1851 Lord Russell's Government considered the desirability of appointing as usual Select Committees of Parliament to go into the Indian question. The view then held was that such an enquiry was not really necessary as the proprietary interests of the Company were no longer involved and

<sup>163</sup> 5 & 6 Wm. IV, c. 52.

<sup>164</sup> 3 & 4 Vict., c. 37, ss. 43-7.

<sup>165</sup> 14 & 15 Vict., c. 40, ss. 20-1.

the whole law by which the governance of India was vested in the Company concerned "only political questions more suited to a Cabinet than to a committee of Parliament".<sup>156</sup> In April 1852, however, Lord Derby's Cabinet thought otherwise, and the two Houses of Parliament set up Select Committees. The Committee constituted by the House of Lords was presided over by Earl Granville and included among its members Lords Ellenborough, Hardinge, Canning, Gough and Broughton. The Committee set up by the House of Commons functioned only for a couple of months and had to be reconstituted in November 1852 owing to the dissolution of Parliament. The new Committee was presided over by T. Baring and included among its members T. B. Macaulay, Lord Stanley and Viscount Palmerston. The two Committees collected a not inconsiderable amount of evidence and other materials, mostly from official sources and from persons in the employ of the Company.<sup>157</sup> Representations were also received from British trading interests, both in India and England, European inhabitants of Bengal, Anglo-Indians, Armenians, Christian missionaries, and public bodies claiming to represent the Indian masses.<sup>158</sup> A noteworthy feature was the great interest evoked by the subject of reform among educated Indians in striking contrast to the nearly total absence of an "Indian" opinion on the subject two decades earlier. While the work of the Committees was still proceeding, Lord Aberdeen's

<sup>156</sup> Letter from Sir J. Hobhouse (later Lord Broughton), President of the Board of Control, to Lord Dalhousie, dated 4 January 1851. Cited in Sir William Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904), Vol. II, pp. 219-20.

<sup>157</sup> Ram Gopal Ghose, a well-known leader of Calcutta, speaking on 29 July 1853, complained, "The evidence so taken must be admitted to be one sided; for of the forty-four witnesses examined, only two were natives; and of the remaining forty-two, nearly all were either servants of the existing Government, or in some way or the other connected with it". "Ram Gopal Ghose—A Memoir" which appeared on his death in the *Hindu Patriot*, 27 January 1868. Also, Memorandum of the British India Association, Parl. Papers, H. L. No. 20 III of 1852-53, p. 247.

<sup>158</sup> Parl. Papers, H. L. No. 20 of 1852-53, Appendix D; H. C. No. 426 of 1852-53, Appendix 7; H. C. No. 768 of 1852-53, Appendix 3; and H. C. No. 897 of 1852-53, Appendix 4.

Cabinet decided to bring the issue to a close, and introduced the Charter Bill in Parliament on 3 June 1853.<sup>159</sup> In drawing up the Bill, it was guided by the lessons derived from the working of the last Charter Act and the trend of recent discussions on the subject of constitutional reform. Lord Dalhousie exercised great influence over the course of the British Government's policy in the matter.<sup>160</sup> The Court of Directors, however, exercised little or no influence, consultations with that body being only formal and very perfunctory.<sup>161</sup> The Bill was piloted through the House of Lords by Earl Granville, and through the House of Commons by Sir Charles Wood, President of the Board of Control. Tory opposition to the measure was led by Lords Broughton and Ellenborough. While the proposal to continue the administration of India in the hands of the Company met with stiff resistance from the "Young India" group,<sup>162</sup> the rest of the Government's proposals had a fairly easy passage. The Bill was passed by the Commons on 29 July and the Lords on 12 August 1853 and received royal assent on the 20th of the latter month.

<sup>159</sup> Sir Charles Wood defended the action, holding that all the information that was material and had relevance to the proposed changes had already been gathered by the Committees and there was no point in postponing the consideration of the subject. Speech on 3 June 1853, Hansard (III Series), Vol. CXXVII, pp. 1095-1101.

<sup>160</sup> Lord Dalhousie submitted a memorandum entitled "Government of India" on 13 October 1852. Sir Charles Wood stated in Parliament that "he had the opinion of the Marquess of Dalhousie and the Bill had been framed in accordance with that opinion". Hansard (III Series), Vol. CXXVII, p. 1031; and W. Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904), Vol. II, pp. 219, 223 & 232-4.

<sup>161</sup> Certain informal consultations with individual Directors appear to have taken place. The Court was, however, formally appraised of the Government's intentions only on 1 June 1853, two days before the Charter Bill was introduced in Parliament. Parl. Papers, H. C. Nos. 632 and 741 of 1852-53, and also comments in the *Calcutta Review*, Vol. XX, July-September 1853, pp. 284-8.

<sup>162</sup> The India Reform Society, which included a number of members of Parliament, was formed in London on 12 March 1853 to focus attention on the subject of Indian reform, and in particular secure the transfer of Indian administration to the hands of the Crown. The Chairman was John Dickinson and among the members were J. B. Blackett, John Bright, Joseph Hume and Richard Cobden.

*Continuance of the Centralised System of Legislation*

A basic change effected in 1833 was the establishment of a centralised system of administration and legislation. During the discussions on the renewal of the Charter, some opinions were expressed by seasoned administrators assailing the foundations of the whole system. It was urged that it had weakened and lowered the dignity of the subordinate Governments and detracted very much from their authority. It had cast too heavy a responsibility on the Governor General in Council, which he was in no position to discharge. Local subjects, particularly in the field of legislation, did not receive attention they deserved and were often disposed of on very inadequate grounds. Consequently, among other things, it was suggested that the Local Governments should be reinvested with legislative authority, at least to enable them to deal with matters of local importance such as municipal bodies, and weights and measures.<sup>163</sup> These opinions found some support from the rudimentary local sentiments expressed by organisations such as the Madras Native Association.<sup>164</sup> The weight of evidence, however, was preponderantly in favour of continuing the existing centralised system of government, particularly on the legislative side.<sup>165</sup> Sir Charles Wood merely gave expression to the prevailing sentiment when he drew pointed attention to the fact that the changes of 1833 had been

<sup>163</sup> Evidence of John Sullivan, retired member of the Governor's Council at Madras (Parl. Papers, H. C. No. 556 of 1852-53, Q. 4663 & 4700), and of Sir Erskine Perry, retired Chief Justice of the Supreme Court at Bombay (Parl. Papers, H. C. No. 426 of 1852-53, Q. 2602-10 & 2772).

<sup>164</sup> Parl. Papers, H. C. No. 426 of 1852-53, Appendix 7.

<sup>165</sup> Evidence of retired members of the Governor General's Council, T. H. Maddock (Parl. Papers, H. C. No. 533 of 1852, Q. 1159), W. W. Bird (*ibid.*, Q. 1067-8), and C. H. Cameron (Parl. Papers, H. C. No. 426 of 1852-53, Q. 2961-2). Also, evidence of Lord Elphinstone, retired Governor of Madras (Parl. Papers, H. C. No. 533 of 1852, Q. 2104 & 2196), Sir Charles Trevelyan, Secretary to the Board of Revenue in Bengal (Parl. Papers, H. C. No. 556 of 1852-53, Q. 5101), J. P. Willoughby, retired member of the Council at Bombay (Parl. Papers, H. L. No. 20 of 1852-53, Q. 3054 & 3077), and F. J. Halliday (*ibid.*, Q. 3497-8) and William Edwards (Parl. Papers, H. L. No. 20 II of 1852-53, Q. 5862-6), who were Bengal civilians,

introduced largely because of continual complaints of wasteful expenditure on the part of the subordinate Governments, and said, "We do not propose that any change should be made in the general control which he [the Governor General in Council] exercises over the whole of the Indian Government."<sup>160</sup> The system of centralised legislation thus continued for eight more years till the passing of the Indian Councils Act of 1861 without any modification.

*Further Expansion of the Governor General's Council  
for Purposes of Legislation*

While the principle of centralised legislation may be said to have stood the test, the legislative machinery set up by the Charter Act of 1833 was found to be quite inadequate to cope with the responsibilities laid upon it. Indeed, under that statute, while the burden of legislating for the whole of British India was placed on the Governor General's Council, a burden which was previously shared by the subordinate Governments also, the only addition made to the Council was that of an English lawyer. There was a strong case for further expanding the Council for purposes of legislation even at that time, but the framers of the Act had thought it better to institute a Law Commission to assist the Council in the matter. If the Commission and the Council had worked in harmony, there might have been no room for regret. But, as will be pointed out in another chapter, the two pulled in opposite directions, which resulted finally in the virtual abolition of the Commission after it had been in active existence for eight years. Owing to this unforeseen development, the burden of legislation fell almost entirely upon the small Council, which was the same for both executive and legislative purposes excepting for the addition of the Fourth Member in respect of the latter. The Council proved quite unequal to the task, and the work of legislation was greatly neglected. The general opinion was that the position would not improve unless the Council was expanded to include persons who could devote more time to the

<sup>160</sup> Speech in the House of Commons on 3 June 1853, Hansard (III Series), Vol. CXXVII, p. 1059.



work.<sup>167</sup> The interests of the executive government, however, clashed with those of the legislature when it came to expanding the Council. The needs of the former required the continuance of the *status quo*, particularly as the portfolio system had not yet been introduced and the Council acted as a board in respect of all matters.<sup>168</sup> The work of legislation, on the other hand, would greatly benefit by having a more numerous body, representative of a large variety of knowledge and experience. The precedent of the Fourth Member being a member of the Council only for purposes of legislation found favour and further development followed in the same direction.

In searching for persons to expand the Council, attention was mostly directed towards official circles, and this was only natural in view of the bureaucratic traditions of the Anglo-Indian administration. The members of the Executive Council

<sup>167</sup> To quote two opinions among the innumerable references on the subject, Lord Dalhousie, writing to Sir Charles Wood on 18 September 1854, observed that it was "morally and physically impossible that such legislative duties as were laid upon them could be performed by five men charged with legislative duties besides with the executive administration of this great empire". W. Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904), Vol. II, p. 236. In his minute of 3 November 1859, referring to his experience as Legislative Member of the Council under the Charter of 1833, Sir Barnes Peacock observed, "I must confess that, when I calmly considered the nature of duties which I had undertaken, I felt almost appalled and overwhelmed. Such duties appeared to me to surpass the powers of any one individual, even though he might possess the vast knowledge and the transcendent abilities of some of my predecessors in office." *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 33. See also the opinion of J. P. Grant, *ibid.*, p. 31.

W. W. Bird, who retired as a member of the Governor General's Council, was one of the few persons who considered the existing system satisfactory. He expressed the view that the whole of the legislative duties could continue to be performed by the one person appointed for the purpose, and he also felt that the executive and legislative functions were so closely connected that they should not be in different hands. Parl. Papers, H. L. No. 88 of 1852, Q. 947.

<sup>168</sup> Viscount Hardinge, for instance, opposed the expansion of the Council, because circulation of papers would take more time and the machinery would become very cumbersome. Parl. Papers, H. C. No. 533 of 1852, Q. 2361.

and the judges of the Supreme Court, as Lord Bentinck observed two decades earlier, were generally regarded as the primary elements of which the Council should be composed. Strong opposition to the inclusion of the judges might have been expected. But there was very little criticism and the idea found favour in most quarters.<sup>169</sup>

Another element for the inclusion of which there was almost universal support was that of representatives from the subordinate Presidencies and Governments.<sup>170</sup> Opinion had been frequently expressed, for a long time, that the constitution of the Governor General's Council was defective in this respect.<sup>171</sup> The only note of hesitation lay in the fear that such persons, appointed solely for the performance of legislative duties, might not have enough work.<sup>172</sup> The other categories of persons whose inclusion was suggested were judges of the Sadar Courts,<sup>173</sup> the Advocate General,<sup>174</sup> Secretaries to

<sup>169</sup> Lord Ellenborough was, however, strongly opposed to the move as will be noticed later.

<sup>170</sup> Dalhousie strongly pleaded for it. W. Lee-Warner, *op. cit.* (London, 1904), Vol. II, p. 231. Sir Charles Wood wrote to the Court of Directors on 5 July 1853, "They [Her Majesty's Government] are impressed with the belief that the presence of members from different parts of India, acquainted with the various habits and native laws and customs of the widely differing regions of that country, is quite essential for this purpose, and they believe also that in this duty they will find full and adequate employment." Parl. Papers, H. C. No. 741 of 1852-53.

<sup>171</sup> During the discussions of 1833, Lord Bentinck recommended the inclusion of civilians from Madras and Bombay in the Governor General's Council. See note on p. 42 above. Joseph Hume and nine other proprietors of the East India Company's stock stated that while passing the last Charter Act Parliament's intention was that the Supreme Government should be partly composed of the Company's servants from the other Presidencies, only one person from Madras had been appointed till the date of their petition. Parl. Papers, H. L. No. 20 III of 1852-53, Appendix D.

<sup>172</sup> Evidence of David Hill (Parl. Papers, H. L. No. 88 of 1852, Q. 3221) and Letter from the Chairman and Vice-Chairman of the Court of Directors, 1 July 1853 (Parl. Papers, H. C. No. 741 of 1852-53).

<sup>173</sup> Evidence of David Hill (Parl. Papers, H. L. No. 20 of 1852-53, Q. 2201), Sir Edward Ryan (*ibid.*, Q. 2466-70) and F. Millett (*ibid.*, Q. 2338-9).

<sup>174</sup> Evidence of David Hill (*ibid.*, Q. 2201), F. J. Halliday (*ibid.*, Q. 3483-6), and memorandum of the Madras Native Association (Parl. Papers, H. L. No. 20 III of 1852-53, Appendix D).

Government<sup>175</sup> and members of the Revenue Board.<sup>176</sup>

There was also the question of utilising the services of persons not in the employment of the Company, both Europeans and Indians. The former were concentrated mostly in the Presidency towns and engaged largely in commerce and industry. They were close knit and well organised. They had a powerful press, and were alert and active in safeguarding their interests. Belonging to the ruling race and having family connections with persons who mattered, both in India and England, they wielded an influence in public life quite disproportionate to their number or real importance. Further, in the absence of a strong politically conscious Indian public, they claimed to constitute "the public", and desired that the Government should conform to their ideas of public good.<sup>177</sup> At the time of the consideration of the last Charter Bill, and again on the present occasion, they demanded representation on the law-making body.<sup>178</sup> In the political climate of the time their representation was considered to be of no less importance than that of the Indian community.

The question of appointing Indians to the legislative body had been raised on the earlier occasion also. But, at that time, the suggestion came mostly from the Company's servants and British politicians who felt that the Legislature would greatly

<sup>175</sup> Evidence of F. Millett (Parl. Papers, H. L. No. 20 of 1852-53, Q. 2338-9).

<sup>176</sup> Evidence of F. Millett (*ibid.*, Q. 2338-9) and F. J. Halliday (*ibid.*, Q. 3483-6).

<sup>177</sup> For an interesting view of the European community playing the role of a spearhead of the democratic movement in India, see J. S. Mill's *Representative Government*, as cited and critically examined in the *Calcutta Review*, Vol. XXXVII, July-December 1861, pp. 170-1.

<sup>178</sup> Petition from certain British and other Christian inhabitants of Calcutta and the neighbouring parts in the Lower Provinces of Bengal (no date). Parl. Papers, H. C. No. 426 of 1852-53, Appendix 7, pp. 480-91. Referring to this petition, the *Calcutta Review* observed, "This petition is in fact a prayer for the alteration of almost every peculiar feature in the present system of Indian Government. It is almost as radical as that of the British Indian Association; with this difference, that whereas the Association desire to see their own countrymen the depositaries of power, the British subjects wish to see it practically transferred to themselves." *The Calcutta Review*, Vol. XIX, January-June 1853, p. 203.

benefit by having first hand the reaction of the Indian community towards legislative projects; this was in no sense a popular demand. The two decades that followed had witnessed a great change. The new educational policy of Lord Bentinck and Macaulay had helped in the rapid growth of the English educated class, imbued with the spirit of nineteenth century liberalism, and it provided the necessary leadership for developing Indian nationalism on democratic lines. The motive force for political organisation came, in a cumulative sense, from unpopular Government measures—resumption of rent-free lands pursued vigorously since 1828, land-revenue policies affecting *zamindari* interests, exclusion of Indians from the covenanted services, measures for severing the time-honoured Government's connection with religious and charitable institutions, the enactment in the teeth of popular opposition of the *lex loci* measure for securing the inheritance rights of Christian converts, etc. The value of a good press and organised agitation was brought home by the example of the European community of Bengal, which was ever vigilant in safeguarding its interests. Help to build up public spirit and political consciousness among Indians came from a number of Europeans settled in India who wanted their support to gain common ends. British humanitarians and radicals also lent their aid, their interest in Indian affairs being particularly roused by the impact of India's economic and social policies on slavery within and without the British Empire. The effect of the interplay of these forces was first noticeable in Bengal. The Hindu College, founded in 1817 by David Hare and others, became the nursery of all progressive thought. In 1828, the Academic Association was started by Young Derozio, whose lectures on metaphysics were "attended by some four hundred young men", many of whom were delving deep in the new thought of Bacon, Lock, Hume, Smith, Paine or Bentham."<sup>170</sup> In 1839, Derozians started the Society for the Acquisition of General Knowledge, and Debendranath Tagore established Tatva-Bodhini Sabha. While the activities of these bodies were mostly on the academic and cultural plane, their impact on political life was immense.

<sup>170</sup> Atulchandra Gupta (Ed.), *Studies in the Bengal Renaissance* [Calcutta, 1958], p. 20.

The Zamindary Association, later known as the Landholders Society, was established in 1837, and it was the first organisation of Bengal with a distinct political object.<sup>180</sup> The visit of George Thompson,<sup>181</sup> the great anti-slavery leader and organiser of the British India Society of London, inspired young Bengalis to form the Bengal British India Society in 1843 with a distinct and comprehensive political object concerning the whole of British India, namely, "to criticise and agitate against and propose amendments to all the measures of the Government—administrative, legal, municipal, educational and social".<sup>182</sup> The stir made by the *lex loci* measure, the successful opposition of the European community to Bethune's "Black Bill" and the Parliamentary enquiry preceding the renewal of the Charter gave rise to further activity. The British Indian Association of Calcutta,<sup>183</sup> destined to play an important rôle during the next twenty years, was formed in 1851, and similar bodies cropped up in the other Presidency towns. The *Hindu Patriot*, whose policy was "decidedly political in tone",<sup>184</sup> appeared in 1853. The position in 1853 was thus very different from what it was twenty years before. There had arisen small groups of politically minded persons who claimed to voice the thoughts, feelings and aspirations of the dumb millions. Their number was much too small. Their representative character was as yet hardly taken seriously. But, such were the humble beginnings of the mighty stream of Indian nationalism.

The petitions submitted to Parliament by the British Indian

<sup>180</sup> *Ibid.*, pp. 16-47 & 139-52.

<sup>181</sup> Raj Jogeshur Mitter, *Speeches of Mr. George Thompson* (Calcutta, 1895).

<sup>182</sup> Jogesh Chandra Bagal, *History of the Indian Association, 1876-1951* (Calcutta, 1953), p. 2.

<sup>183</sup> The leading members of the Association were Hurrish Chunder Mookerjee, Editor of the *Hindu Patriot* from 1856-60, Ram Gopal Chose, member of Lord Dalhousie's Council of Education and member of the first Legislative Council of Bengal (1862-64), and Babu Prosonno Coomar Tagore, whom Lord Dalhousie appointed as Clerk-Assistant of the Legislative Council in 1854.

<sup>184</sup> Sir George Cumming (Ed.), *Political India, 1832-1932* (London, 1932), p. 35.

Association,<sup>185</sup> the Madras Native Association,<sup>186</sup> and the Bombay Association<sup>187</sup> give us the views of these politically minded persons on the subject of constitutional reform.<sup>188</sup> The common demand of all the three bodies was that greater confidence should be placed in the natives of the soil and they should be given immediately a substantial share in the administration of the country. The petition from the British Indian Association perhaps marks the heights to which the demands of political India rose at the time. Under the scheme which the Association put forward, the Board of Control and the Court of Directors were to be abolished, and in their place a body of twelve members was to be set up, half its members being nominated by the Crown and the other half elected by persons holding a substantial share of the East India Company's promissory notes, whether Indian or European, residing in India or in England. A legislative body, distinct and separate from the executive government, sitting with open doors, was to be set up, and it was to possess a popular character "so as in some respects to represent the sentiments of the people, and to be so looked upon by them". It was to be composed of seventeen members, of whom twelve were to be Indians and five Europeans. As for the former, three were to be selected from each of the four Presidencies (including the North-Western Province which was to be made into a Presidency) from amongst the most respectable and qualified persons. Until the people might be trusted to elect them, they were to be nominated by the Governor General in consultation with the Governors of the several Presidencies.<sup>189</sup>

<sup>185</sup> Parl. Papers, H. L. No. 20 III of 1852-53, pp. 249-51. This petition is considered to be "the first political document of constructive statesmanship emanating from an Indian public body". Atulchandra Gupta, *Studies in the Bengal Renaissance* (Calcutta, 1958), p. 45.

<sup>186</sup> Parl. Papers, H. C. No. 768 of 1852-53, p. 120, and H. C. No. 426 of 1852-53, p. 438.

<sup>187</sup> Parl. Papers, H. C. No. 426 of 1852-53, p. 476.

<sup>188</sup> See also "Ram Gopal Ghose—A Memoir", which appeared in the *Hindoo Patriot* on 27 January 1868.

<sup>189</sup> The petition from Madras recommended that the Indian members should be selected from a panel of persons "chosen by the votes of the ratepayers in Madras, and of persons eligible to serve as the grand and

Of the European members, four were to be civilians of high standing, one from each Presidency being named by the Governor to represent the interests of the Government. The remaining European member was to be a legal gentleman appointed by the Crown, and he was to act as President of the Council. To ensure the independence of the members, it was proposed that they should have a fixed tenure of five years and were to be not removable except on proof of misconduct before a criminal court. The laws passed by this body were to receive the assent of the Governor General in Council before coming into force, and in case the assent was withheld unreasonably there was to be a right of appeal to Parliament. No other authority except Parliament was to have any power to repeal or alter laws duly enacted and brought into force in India. Parliament itself was not to effect any change in the laws or constitution of this country without giving notice of twelve months so that the Legislative Council and the people of India might present their views through a counsel at the bar of Parliament. As regards the civil service, the distinction between the covenanted and the uncovenanted service was to be abolished, and the provision contained in the Charter Act of 1833 against racial discrimination strictly enforced in its true spirit.

These demands of " 'Young Calcutta' in the infancy of its education "<sup>100</sup> were not taken seriously by the ruling class. While the friends of India perhaps tried to suppress a smile, the conservative group wanted no encouragement to be given to such ideas. Lord Ellenborough said in the House of Lords on 7 April 1853, "At the earliest practicable opportunity these petitioners and the people of India should be made thoroughly to understand that Parliament was determined to hold the dominion we had acquired; that they knew it could only be held by maintaining the supremacy of the British mind; that which others had won they were resolved to maintain; that they knew it could only be maintained by

petty juries or in such other manner as your Honourable House may deem preferable". Parl. Papers, H. C. No. 426 of 1852-53, p. 469.

<sup>100</sup> Characterised as such by Lord Ellenborough. Hansard (III Series), Vol. CXXV, p. 709.

the same acts by which it was acquired; but that Englishmen and English mind should continue to exercise that dominion which had been so acquired."<sup>101</sup> What was within the realm of practical politics was the inclusion of a couple of Indians in the legislative body, the object being only to improve the quality of legislation, not to transfer power to Indian hands or to set them on the road to self-government. Opinion was, however, strongly divided upon the feasibility of even this proposal. Those who opposed the move were of the opinion that Indians must have greater experience of administration at higher levels, that there should be greater spread of education and greater growth of political consciousness amongst them, before the question of their representation in the Legislative Council could be considered.<sup>102</sup> Some persons laid stress on the vast size of the country and the deep and the many sided socio-economic cleavages among the people, and the consequent difficulty of finding persons who might fairly represent the community as a whole.<sup>103</sup> On the other hand, Lord Dalhousie and a number of others

<sup>101</sup> *Ibid.* The *Calcutta Review* wrote of the petitioners, "They wish for a modification of the present constitution, such as shall practically destroy the whole idea of conquest, restore to the natives the possession of their own country, and leave to the European the thankless task of fighting for the benefit of his native lords." Vol. XIX, January-June 1853, p. 196.

<sup>102</sup> Macaulay expounded this view-point best when he said in Parliament, "I cannot conceive anything more pernicious than the suggestion which has been made, that before you admit any native to the service at all, before any native has been even an assistant collector or judge, you should take some native, and appoint him a member of the Legislative Council. That, of all propositions, would seem to me least likely to promote the real benefit of the people of India." As a matter of long range policy, however, he said, "We shall not secure or prolong our dominion in India by attempting to exclude the natives of that country from a share in its Government, or by attempting to discourage their study of western arts or learning." Hansard (III Series), Vol. CXXVIII, pp. 758-9. Also, see evidence of David Hill (Parl. Papers, H. L. No. 20 of 1852-53, Q. 2202), F. Millett (*ibid.*, Q. 2328), H. T. Prinsep (Parl. Papers, H. C. No. 533 of 1852, Q. 910) and J. S. Mill (Parl. Papers, H. L. No. 88 of 1852, Q. 3028).

<sup>103</sup> Evidence of F. J. Halliday (Parl. Papers, H. C. No. 426 of 1852-53, Q. 2014-23 and 2066-71) and Sir George Russell Clerke, who was Governor of Bombay (*ibid.*, Q. 2286-8).



conversant with Indian affairs were of the opinion that men having the requisite qualifications could be found and they should be appointed to the Council.<sup>104</sup> A suggestion was made by some persons who were not prepared to go to this length that a consultative body might be formed to ascertain the wishes of the Indian community.<sup>105</sup>

The proposals of the British Cabinet submitted to Parliament were based on its appreciation of what was desirable under the circumstances. Under them, the Governor General's Council was to be strengthened for purposes of legislation by the addition of the following persons: (1) two judges, namely, the Chief Justice and one other puisne judge of the Supreme Court of Calcutta; (2) one civil servant of the Company of ten years' standing from each Presidency and Lieutenant Governorship appointed by the head of the Local Government concerned; and (3) two other civil servants of the Company of ten years' standing, whenever the Court of Directors with the assent of the Board of Control thought it expedient to make such appointments.<sup>106</sup> With a view to

<sup>104</sup> Dalhousie wrote to Sir Charles Wood on 21 March 1853, "Indeed, amidst the general unfitness, there are already some native gentlemen, whose intellectual qualities, whose experience of government, and whose minute knowledge of details, would render any one of them a very valuable member of the Legislative Council. For my part I should be personally glad to see such a gentleman appointed at once under the new Act." W. Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904), Vol. II, p. 232. Also, see evidence of C. H. Cameron (Parl. Papers, H. C. No. 897 of 1852-53, Q. 2957-8) and Sir Edward Ryan (Parl. Papers, H. L. No. 20 of 1852-53, Q. 2466-70). James Silk Buckingham favoured representation of Indians as well as of European residents in India in the British Parliament and also in the Legislative Council to be formed in India. *Plan for the Future Government of India* (London, 1853), pp. 11-14 & 19.

<sup>105</sup> Lord Ellenborough (Parl. Papers, H. C. No. 533 of 1852, Q. 2297) and Lord Elphinstone (*ibid.*, Q. 2114). F. J. Halliday suggested the formation of a panel of competent Indians who could be individually consulted (Parl. Papers, H. C. No. 426 of 1852-53, Q. 2105-8).

<sup>106</sup> Section 22 of the original Bill. Parl. Papers, H. C. No. 591 of 1852-53. The immediate appointment of the two additional members was not contemplated. This power was to be exercised only "if the Governor General should find the numbers inadequate for the work." Parl. Papers, H. C. No. 741 of 1852-53, p. 8.

cut down the expenses, the Court of Directors recommended that there should be only four paid members, one each from Bombay, Madras and Bengal, and one selected by the Governor General. The preference was for the Council to holding periodical sessions only, since this would make temporary detachment of officers from the subordinate Governments possible. If the Council was to be in permanent session, this would be the best tribunal for examining and bringing to conclusion the labours of the late Law Commission, and the idea of setting up a separate commission in England might be dropped. The views of the Court of Directors had no influence on the policy enunciated by the Government.<sup>197</sup> During the passage of the Bill through Parliament, an important amendment was moved in the House of Commons by Sir Herbert Maddock to the effect that instead of the additions proposed by the Cabinet, three persons from outside the service of Her Majesty or the Company, European or Indian, should be appointed; but it was not accepted.<sup>198</sup> There was also a proposal by Lord Ellenborough which if carried would have omitted the judges as well as the Fourth Member from the Council.<sup>199</sup> The Government's scheme was amended only in one respect. The military servants of the Company were made eligible for appointment to the two additional posts to be created with the approval of the Court of Directors whenever necessary, and these posts were to be filled by the Governor General acting in his discretion.<sup>200</sup>

The net result of the changes proposed was as follows. The strength of the Governor General's Council was increased for purposes of legislation by six to eight members, and these were in no way connected with the executive government. The English law element was greatly increased, and each of

<sup>197</sup> *Ibid.*, p. 20.

<sup>198</sup> The amendment was ably supported by James Hume, J. B. Blackett and Viscount Jocelyn, and it was opposed by Sir Charles Wood and Lord Stanley. The motion was negatived by 39 votes to 168. Hansard (III Series), Vol. CXXVIII, p. 860, and Vol. CXXIX, pp. 418-24.

<sup>199</sup> Parl. Papers, H. L. No. 356-B of 1852-53.

<sup>200</sup> Section 22 of Bill as amended (Parl. Papers, H. C. No. 922 of 1852-53), Hansard (III Series), Vol. CXXIX, pp. 1443-6, and 16 & 17 Vict., c. 95, s. 22.

the Local Governments had now normally an effective spokesman to represent its views and safeguard its interests. The latter was also likely to be useful for providing the Council with first hand information on points of local bearing.

### *Future of the Office of the Fourth Member*

With this expansion of the Council for purposes of legislation, and particularly with the two judges of the Supreme Court as members, the continuance of the English lawyer as Fourth Member might have appeared superfluous. The consensus of opinion, however, was that a person versed in law should continue to be associated with the Executive Council, because a large number of questions involving legal issues came up for consideration in every Department, questions not merely of interpreting the law, but of deciding upon the action to be taken by way of legislation or executive order. Such a person would be also of great help in drafting Government measures for submission to the Legislative Council.<sup>201</sup> Lord Ellenborough was one of the few persons who did not agree with this view. He felt that if a competent man was appointed as Advocate General there would be no need for an English lawyer. He favoured instead the appointment of "some youthful English statesman of business habits, and acquainted with the mode of managing affairs in some public department in this country".<sup>202</sup> The office of the Fourth Member was nevertheless continued under the new Charter Act,<sup>203</sup> but it was not made clear that the person

<sup>201</sup> Lord Dalhousie wrote to Sir Charles Wood on 21 March 1853, "I have doubt on one point only—the abolition of the English lawyer. Men whose opinion I respect consider that the Advocate General would not be capable of the work." W. Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904), Vol. II, p. 231. Also, evidence of Viscount Hardinge (Parl. Papers, H. C. No. 533 of 1852, Q. 2362), F. Millett (*ibid.*, Q. 1647-8), T. H. Maddock (*ibid.*, Q. 1322-4), W. W. Bird (*ibid.*, Q. 1072), David Hill (Parl. Papers, H. L. No. 88 of 1852, Q. 3243-5) and J. S. Mill (*ibid.*, Q. 3135).

<sup>202</sup> Hansard (III Series), Vol. CXXVIII, p. 22, and Vol. CXXIX, p. 1442. Also, Parl. Papers, H. C. No. 533 of 1852, Q. 2291.

<sup>203</sup> Under the new Charter Act, the appointment of the first three

to be appointed should be a lawyer.<sup>204</sup> That this was the intention of the framers of the Act is, however, clear from the discussions of the time,<sup>205</sup> and the provision in the Act that the Chief Justice, the puisne judge or the Fourth Member should be present for a valid meeting of the Legislative Council.<sup>206</sup> The elasticity of the law proved useful when the British Government sent James Wilson and Samuel Laing in 1859 and 1861 respectively to reorganise the finances of India. The absence of a legal member was, however, so keenly felt that the Indian Councils Act, 1861, made a firm provision that a lawyer of standing should be appointed to the Council.<sup>207</sup>

The changes effected in the structure of the legislative body made one important modification necessary in the law in respect of the Fourth Member. Under the Charter Act of 1833 the Fourth Member was entitled to sit and vote only at meetings for making laws and regulations. This restriction had proved to be unduly cramping, and had been considerably relaxed in practice. Now that the Council was greatly expanded for purposes of legislation there was no case at all for continuing the restriction and it was abolished.<sup>208</sup> The Fourth Member from now on became a full-fledged member of the Executive Council.

members of the Council was also to be made with the approval of Her Majesty (16 & 17 Vict., c. 95, s. 20). The constitutional distinction between these members and the Fourth Member now lay only in the fact that the latter was selected from outside the Company's service.

<sup>204</sup> See note 3 at p. 57, above.

<sup>205</sup> In his correspondence with the Court of Directors and Lord Dalhousie, Sir Charles Wood refers to the Fourth Member as the "Legislative Councillor". Parl. Papers, H. C. No. 741 of 1852-53; and W. Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904), Vol. II, p. 233.

<sup>206</sup> 16 & 17 Vict., c. 95, s. 23.

<sup>207</sup> 24 & 25 Vict., c. 67, s. 3. Also, views expressed by Lord Canning, H. B. E. Frere and Cecil Beadon. *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), pp. 32, 34, 42, 46 & 52-3.

<sup>208</sup> 16 & 17 Vict., c. 95, s. 21. The motion for the purpose was carried without much discussion. Hansard (III Series), Vol. CXXIX, p. 1442.

*Second Law Commission*

The future of the Law Commission that had been set up under the Charter Act of 1833 was also an important matter for consideration. The chequered history of this Commission has been traced in a subsequent Chapter. Suffice it to say here that the relations of the Commission with the Government of India were very much strained. Nothing very tangible emerged by way of finished laws from its activities, and for all practical purposes it stood abolished, without Parliamentary sanction, after eight years of active existence. There was great disappointment at this unexpected turn of events, and during the discussions at the renewal of the Charter the subject of codification received a good deal of attention. Was the project of codification ill-conceived or the machinery set up for the purpose faulty? From the evidence tendered before the Select Committees of Parliament it appears that the fervour for universal codes and comprehensive reforms had very much cooled down. Still, the general feeling was that codification in certain fields, specially penal and procedural laws, was a matter of urgent necessity.<sup>259</sup> There was, therefore, no question of any material revision of the objective set forth; it was the machinery that required overhauling. In seeking a solution thoughts flowed in two different directions. The old machinery had failed because power was divorced from responsibility. As will be explained later on, the Commission, charged with the duty of maturing great schemes reform, had no voice in actual legislation, and the Governor General's Council, vested with supreme legislative authority, had no time to digest the schemes which were submitted and enact laws it thought best; the thinking and the willing parts of the legislative organism were

<sup>259</sup> Evidence of John Sullivan (Parl. Papers, H. C. No. 556 of 1852-53, Q. 4940-6), F. Millett (Parl. Papers, H. L. No. 20 of 1852-53, Q. 2317), F. J. Halliday (*ibid.*, Q. 3667-8), Sir Edward Ryan (*ibid.*, Q. 2490-2532), and Sir Erskine Perry (*ibid.*, Q. 2639 & 2722). Charles Trevelyan was alone in recommending preparation of general codes on the same old lines as envisaged in 1833, including the civil laws of the Hindus and Muhammadans. Parl. Papers, H. C. No. 556 of 1852-53, Q. 5101. Also, Eric Stokes, *The English Utilitarians and India*, (Oxford, 1959), pp. 253-4,

very much out of joint. The obvious remedy lay in strengthening the Legislative Council and placing the whole responsibility squarely on its shoulders.<sup>210</sup> This was clearly the correct and logical approach. But there was a deep distrust of the Indian Government among the advocates of codification, arising out of the disappointments of the last two decades. They were afraid that the atmosphere in India was not quite favourable for reform, and the Indian Legislature, however constituted, might not take kindly to the measures in view. Their proposal was, therefore, that a statutory commission should be set up in England to take charge of the work on the great codes. Its recommendations were to be translated into enactments by Parliament or communicated to the Government of India with firm directions that they should be adopted.<sup>211</sup>

The Government's plan was based on the latter of these views, concessions being made to accommodate the former view in some respects. A Commission was to be set up in England under the authority of the Crown to examine and report upon the various suggestions and recommendations of the late Indian Law Commission, and it was to complete its work within three years.<sup>212</sup> The implementation of its

<sup>210</sup> This approach found clear expression in the discussions of 1842-43 on the question of the discontinuance of the Law Commission. See Chapter IV below and also evidence of F. Millett and F. J. Halliday, *Parl. Papers*, H. C. No. 426 of 1852-53, Q. 1490-6 & 1941-3. There was practically no demand for a revival of the Commission in India on the old basis.

<sup>211</sup> C. H. Cameron, who had been a member of the Law Commission and later the Fourth Member, was the moving spirit. See his petition to the Select Committee of Parliament, 15 November 1852, and his evidence on 14 April 1853. *Parl. Papers*, H. C. No. 426 of 1852-53, Q. 2870-85 & 2954. Among other advocates of the proposal to set up a Commission in England were Sir Edward Ryan (*Parl. Papers*, H. L. No. 20 of 1852-53, Q. 2454-8) and Sir Charles Trevelyan (*Parl. Papers*, H. C. No. 556 of 1852-53, Q. 5101). F. J. Halliday did not favour the proposal, but he wanted the Penal Code to be settled in England (*Parl. Papers*, H. L. No. 20 of 1852-53, Q. 3493-6).

<sup>212</sup> It was proposed to include in the Commission "the three or four gentlemen who were members of the Law Commission and now in England, two or three members of the English bar, with other gentlemen who might volunteer their services". Sir Charles Wood's speech in Parliament on 3 June 1853, *Hansard (III Series)*, Vol. CXXVII, p. 1162.

reports was entirely a matter for the Legislative Council of India. Sir Charles Wood, in his letters to the Court of Directors and in his speeches in Parliament,<sup>213</sup> was at pains to explain that in making this proposal there was no intention to encroach upon the legitimate functions of this Council or to curtail its authority. A Commission in England was considered to be the best course for bringing to fruition the labours of the earlier Law Commission, mainly because "many of the gentlemen who took the most active part in that Commission"<sup>214</sup> were then in England, and in many cases the decision of the authorities in England was pending. It was proposed "only as a temporary measure for this sole purpose".<sup>215</sup> Beyond what was expected to be done by this Commission there was a vast field by way of consolidating and revising the laws and regulations of India to occupy the attention of the Government of India. A Commission in India on the lines of the old body was not proposed in view of the additions made to the Governor General's Council for purposes of legislation, and reliance was being placed in this respect upon "the exertions of the Legislative Councillor and unofficial members of the Council".<sup>216</sup> There was one serious snag in the proposed arrangements. What would happen if the Commission in England and the Legislative Council of India differed in any matter? This was no groundless fear as it was the discordancy between the earlier Law Commission and the Government of India that had given rise to so much trouble.<sup>217</sup> The Government hoped that the Legislative Council of India would not act unreasonably in implementing the recommendations of the Law Commission, or oppose the wishes and sentiments of the Court of Directors expressed in this connection.

The Government's plan was distasteful both to the Court

<sup>213</sup> *Ibid.* Also, Parl. Papers, H. C. No. 741 of 1852-53, pp. 5-8.

<sup>214</sup> Parl. Papers, H. C. No. 741 of 1852-53, p. 7.

<sup>215</sup> *Ibid.* <sup>216</sup> *Ibid.*, p. 8.

<sup>217</sup> Again, in 1870, the third Indian Law Commission constituted in England resigned, because its recommendations in respect of the Indian Contract Bill were not implemented by the Government of India. B. K. Acharya, *Codification in British India* (Calcutta, 1914), p. 238.

of Directors and Lord Dalhousie. The former saw no necessity for a Law Commission, either in India or in England, in view of the enlargement of the Council.<sup>218</sup> The latter viewed the setting up of a Commission in England as an unjustified reflection on the conduct of the previous administrations in India and expressed his strong resentment.<sup>219</sup> But the plan went through Parliament without any significant opposition and came to be adopted.<sup>220</sup>

*Relations of the Legislative Council with the Executive Council  
and the Court of Directors*

Although in theory there was only one Council for both executive and legislative purposes as before, the enlargement of the Council for purposes of legislation under the Charter Act of 1853 had brought into being a distinct and separate body, and the question of the relations between the executive and the legislature assumed real importance.<sup>221</sup> No attempt was, however, made in the Charter Act to define accurately their respective functions or to prescribe their relative roles. The only change effected was in respect of the powers of the Governor General. Under the Charter Act of 1833 his assent was necessary for the validity of laws only if he was separated from his Council at the time of their enactment. It was now laid down that his assent should be had "whether he shall or shall not have been presenting in Council at the making thereof".<sup>222</sup>

There was also no change in the existing provisions governing the authority of the Court of Directors in the field of legislation. As will be explained in a later Chapter, there had been continual conflicts between the Government of India and

<sup>218</sup> Parl. Papers, H. C. No. 741 of 1852-53, p. 4.

<sup>219</sup> W. Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904), Vol. II, p. 236.

<sup>220</sup> 16 & 17 Vict., c. 95, s. 28.

<sup>221</sup> Indeed the change had occurred in 1833. But, the Fourth Member being the only additional member to the Governor General's Council, the question did not assume any great importance.

<sup>222</sup> 16 & 17 Vict., c. 95, s. 24.



the Court of Directors during the previous two decades on the latter's claim to have the same unlimited power of supervision and control in respect of legislation as in other matters. An attempt was made in Parliament to lay down clearly that the only general power vested in the Court of Directors was that of vetoing laws duly enacted, and it did not extend to issuing directions as to what laws should be enacted.<sup>223</sup> This was resisted successfully by the Government who upheld the Court's claim, Sir Charles Wood citing the maxim, "Prevention is better than cure."<sup>224</sup>

*Changes in the Scope of the Authority of the  
Legislative Council*

While the powers conferred on the Government of India by the Charter Act of 1833 were quite wide and extensive, some of the restrictions imposed by it were found to be in actual working very cramping. Representations from the Government of India had been received from time to time seeking a better definition of its powers and, if necessary, an extension of its authority. The most important of the restrictions was the provision that no law should be made "which shall in any way affect any prerogative of the Crown".<sup>225</sup> What constituted the Crown's prerogative in India was a matter on which legal opinion was sharply divided, and the uncertainty affected adversely many vital matters such as creation of corporations, patent rights, escheats and grant of reprieves. To make it possible for the Legislative Council of India to enact laws in respect of such matters without prejudice to the interests of the Crown, it was now laid down that a law affecting the Crown's prerogative may be enacted with the previous sanction of the Crown obtained in due form. It was also laid down that all fines, penalties and forfeitures, escheats, and properties devolving *bona vacantia* should belong to the Company "in trust for Her Majesty for the service of the Government

<sup>223</sup> Speeches by J. B. Blackett and Lord Monteagle. Hansard (III Series), Vol. CXXVIII, pp. 47-8 & 1436, and Vol. CXXIX, pp. 775-7 & 1673-5.

<sup>224</sup> *Ibid.*, Vol. CXXIX, pp. 776-7.

<sup>225</sup> 3 & 4 Wm. IV, c. 85, s. 43,

of India". The Governor General in Council and persons empowered by him by law were authorised to make such grants or dispositions of these properties as they considered proper.<sup>226</sup> There were a number of other directions in which the limitations on legislative jurisdiction had been felt to be very severe, *e. g.* extra-territorial crimes and crimes on high seas, and legislation in respect of areas acquired after the last Charter and the non-Regulation Provinces. But the question of extending the authority of the Government of India in respect of any of these matters did not receive serious consideration at the hands of Parliament.

There was an attempt to limit the authority of the Legislative Council of India in one direction. Act XXI of 1850, dealing with inheritance rights of Christian converts, had raised a storm of opposition among the people. Many seasoned administrators expressed the view that its enactment had been precipitate and unwise,<sup>227</sup> and it was necessary to provide against such a thing happening again. Sir Herbert Maddock, supported by James Hume, moved an amendment "that in making laws and regulations, regard shall be had to the religion and manners and opinions of the different races of people inhabiting the said territories".<sup>228</sup> The proposal was negatived, but even if it had been adopted it would have been a policy directive and not a firm limitation on the powers of the Council.

### *Legislative Procedure*

The question of the procedure to be followed by the Legislative Council was a matter largely to be decided by the Council itself. Parliament prescribed only a couple of rules which it considered to be of basic importance. The Governor General

<sup>226</sup> 16 & 17 Vict., c. 95, ss. 26-7. These provisions were added to the Bill at a meeting of the whole Committee on a motion of Wigram agreed to by Sir Charles Wood. Hansard (III Series), Vol. CXXIX, pp. 960-2.

<sup>227</sup> Petition from the British India Association, Parl Papers, H. L. No. 20 III of 1852-53, p. 251, and speech by Lord Ellenborough, Hansard III Series, Vol. CXXIV, p. 638.

<sup>228</sup> Hansard (III Series), Vol. CXXIX, pp. 556-7,

was to appoint one of the members of the Council as Vice-President. Meetings of the Council were to be presided over by the Governor General, and in his absence by the Vice-President or the senior ordinary member of the Executive Council present. The quorum was fixed at seven, and for a valid meeting of the Legislative Council there were to be present the Governor General or the Vice-President or some ordinary member of the Executive Council, and also one of the judges or the Fourth Member of the Council.<sup>229</sup> The object was clearly to ensure that the executive government and the legal element were represented at all meetings of the Legislative Council, but the provision did not cover all contingencies. When the Vice-President was appointed from outside the Executive Council, there could be a valid meeting of the Council without any member of the executive government being present.<sup>230</sup> During the discussions on the Charter Bill, the limitations of the system of exchanging minutes on legislative projects were frequently referred to, and it was suggested that reliance should be placed on oral discussions as far as possible. It was also suggested that the meetings of the Legislative Council should be open to the public and its proceedings published. Sir Charles Wood expressed the view at the time that these were matters of detail which should be left to the Council itself to decide.<sup>231</sup> These suggestions were later accepted by the Legislative Council and incorporated in its standing orders.

*Significance of the Changes effected by the  
Charter of 1853*

The most significant consequence of the reforms was that executive and legislative powers came to be vested in different

<sup>229</sup> 16 & 17 Vict., c. 95, s. 23. The provision that a senior ordinary member of the Executive Council should preside in the absence of the Governor General and the Vice-President was added on the motion of Lord Ellenborough. Hansard (III Series), Vol. CXXIX, p. 1446.

<sup>230</sup> Meetings without any member of the Executive Council being present were held in 1860 on three occasions. Proceedings of the Legislative Council of India, 1860, pp. 1175, 1180 & 1184.

<sup>231</sup> Hansard (III Series), Vol. CXXVIII, p. 382,

hands, and from this followed the many knotty problems concerning executive-legislative relationship. In the new legislative body, as against six members of the Executive Council (including the Governor General and the Commander in Chief), who may in a sense be said to have constituted the Treasury Bench, there were two judges, four representatives of the Local Governments, and, if the appointments were sanctioned, two nominees of the Governor General, who formed the potential opposition. If all the seats were filled, the executive wing would be in a minority; otherwise, the two wings would be equally balanced, deadlocks being resolved by the casting vote of the Governor General. In this connection two important questions that arose were left unanswered. Were the members of the Legislative Council to act according to their conscience in respect of *all* matters? Or, in the case of measures emanating from the executive Government, were the members of the Executive Council, in their capacity of Legislative Councillors, bound to support the decisions reached by that body? What would happen if measures considered essential by the Executive failed to get through the Legislative Council or if measures passed by the Legislative Council were unreasonably vetoed by the Governor General?<sup>233</sup> The changes in the composition of the Legislative Council had also a significant effect on the relations with the Court of Directors in legislative matters. As will be seen later, relying on the powers conferred on it by the Charter Act of 1833, the Government of India had repeatedly contested the right of the Court of Directors to issue instructions as to what laws should be enacted; and for enforcing obedience to its orders, the Company's Standing Counsel had found support only in Section 80 of the Act, which treated all disobedience of orders and breaches of trust by officers or servants of the Company in India as misdemeanours. Opinion was divided on the question whether this provision extended to the field of

<sup>233</sup> Lord Ellenborough, speaking in 1861, put the position briefly and correctly when he said, "The difference between this and the former state of things is the difference between a majority and a minority, which seems to me to be very important in matters of legislation." Hansard (III Series), Vol. CLXII, p. 1167,

legislation at all. In any case, it could not be considered applicable to the judges of Her Majesty's Court in their capacity of Legislative Councillors. The presence of the judges, who were in every sense truly independent, was sure to encourage the other members to resist the doubtful authority of the Court of Directors whenever the occasion presented itself. Thus, the broad effect of the changes was to increase the points of friction. The position was made still worse by the decision taken in India to throw open the meetings of the Legislative Council to the public and also permit the publication of its proceedings. Publicity was likely to encourage members, even though they were all responsible officials, to play to the gallery and also make them less willing to modify their views in the light of fresh arguments and knowledge. Further, differences among the members on public questions, when they came to be known, were bound to influence the attitude of the public, and there was a likelihood of the prestige and authority of the Government being affected adversely. Surprisingly enough, in the Charter discussions, we see little realisation of these dangers, and in the view of most persons, the Legislative Council was, to use an expression of Sir Barnes Peacock, "simply increased by members of practical experience".<sup>233</sup> Indeed there could have been no more facile appreciation of the position.<sup>234</sup>

<sup>233</sup> Minute dated 3 November 1859. *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 33.

<sup>234</sup> Lord Leydon and Lord Ellenborough, speaking in 1861, observed that Lord Broughton was the only person, not excluding themselves, who foresaw the dangers ahead. Hansard (III Series), Vol. CLXII, pp. 1160 & 1166. For Lord Broughton's illuminating speech on the occasion, see *ibid.*, Vol. CXXIX, pp. 1444-5.

## CHAPTER III LEGISLATIVE COUNCIL AT WORK

### *A.—Period of the Charter Act of 1833*

#### *Legislative Council vis-a-vis Executive Government*

IN the previous chapter, we examined the machinery set up for legislation under the Charter Acts of 1833 and 1853, and we shall now pass on to study the manner in which it worked. The first question to be considered in this connection is the relationship that subsisted between the legislative and the executive wing of the Government of India. Prior to 1833, this question hardly arose, because the composition of the Councils at the three Presidencies was the same for both executive and legislative purposes.<sup>1</sup> With the passing of the Charter Act of 1833, a distinct legislative organ emerged, since the Fourth Member was a member of the Governor General's Council only for purposes of legislation. The Act, however, gave no direction as to the relationship that was to subsist between the two organs of the Government. On the very day Macaulay assumed office as Fourth Member he raised the question whether the Act had set up a legislature distinct and independent of the executive, and if so, what their respective powers and functions were.<sup>2</sup> In his opinion, it had constituted "an Executive and a Legislative Council", but it had made "no partition of power between them". In the absence of specific directions in the matter, he contended "that the partition of power in the Government of India should be analogous to that which exists in the Government of England—that the Executive Council should exercise the same prerogatives which at home belong to the Crown, and that an act of the Legislative Council should be necessary in all cases in which at home an act of Parliament is required".

<sup>1</sup> The Governor General and the Governors had no power of veto in legislative matters, and as such a conflict between the executive and the legislative wing of the Government could well be, in a remote sense, envisaged even before 1833. But this was not of much practical significance.

<sup>2</sup> See note 108, p. 56 above.

He continued, "If we put this sense in the clause—and I am unable to find any more probable sense—it follows that the army cannot be augmented in time of peace, that taxes cannot be imposed even for local purposes, that money cannot be borrowed on the public faith of the Indian Empire, without a vote of the Legislative Council. No state prisoner can be detained in custody without such a vote. No treaty with any neighbouring power stipulating for any payment of money on our part will be binding without such a vote. It is plain that, if this rule be adopted, the Legislative Council will exercise in India, as the Parliament exercises in England, a control over almost all the proceedings of the Executive Government. Though the Fourth Member may have no vote on a question, for example, of going to war, yet he will have a vote when the question is about furnishing the sinews of war; and his opposition on the question of supply may prevent the Executive Council from carrying its purposes into effect, or may force the Governor General to have recourse to his extraordinary authority."<sup>3</sup> In brief, he was claiming for the Legislative Council of India all the powers and privileges of the mother of Parliaments.

Lord Bentinck struck at the root of Macaulay's far-fetched claims by denying that the Act had created a legislature different from the executive. He observed "that the new Act has not altered the character of the Council, that it is one and the same for executive and legislative purposes, that in its executive capacity it can make peace and war, raise money, and do all that it has heretofore done, without requiring the interference of the same Council in its legislative capacity to give validity to its acts". The Fourth Member was no more than an *additional* member of the Council when matters pertaining to legislation came up for discussion.<sup>4</sup>

The Court of Directors, to whom the question was referred,<sup>5</sup> did not take specific notice of Macaulay's claims; but, in Public

<sup>3</sup> Macaulay's minute, 27 June 1834, Ootacamund Pol. Pros., 9 August 1834, No. 7. Also, his minute of 13 June 1835, Leg. Dep. Pros., 6 July 1835, No. 11.

<sup>4</sup> Minute dated 31 July 1834, Ootacamund Pol. Pros., 9 August 1834, No. 8.

<sup>5</sup> Pol. Letter to Court, 9 August (No. 10) 1834.

Despatch dated 10 December (No. 44) 1834, para 21, it clearly endorsed the stand taken by Bentinck. The Directors regarded the Fourth Member as the legislative adviser of the Council with a right to vote at its meetings for making laws and Regulations, and laid stress on the fact that his concurrence or even his presence was not necessary for the validity of the laws passed by the Council. Thus, Bentinck's view that the Act had not set up an independent legislature, and that the Council was one and the same for both executive and legislative purposes, came to be the accepted view,<sup>6</sup> and further arrangements proceeded on this basis.

### *Creation of the Legislative Department*

Before 1833, draft Regulations were considered and passed by the Governor General in Council in the Department concerned and then transferred to the Judicial Department for "record and promulgation".<sup>7</sup> This procedure was continued even after

<sup>6</sup> We find Lord Bentinck's views re-echoed in an interesting minute of C. H. Cameron, a later Fourth Member, which was recorded in connection with his suggestion that the Government of India in its executive capacity should be invested with a general power to remove any part of the Regulation areas from the purview of the Regulations. Replying to the charge levelled by Lord Hardinge that his suggestion was constitutionally inappropriate, he observed that he could not recollect anything in the constitutional law of the country "tending to show that the exclusion of the Fourth Member from the Executive Council was intended to create the sort of security for good government which arises from vesting the powers of the executive in one set of men and those of the legislature in another". He further observed that constitutionally there was only one council, namely, the Council of the Governor General, and this body met as a legislature only because laws in general required more mature deliberation. Minute dated 5 June 1846, Leg. Dep. Pros., 27 June 1846, No. 7. Two other members of the Council, F. Millett and T.H. Maddock, concurred in the minute. *Ibid.*, Nos. 8 & 9.

<sup>7</sup> Bengal Regulation XLI of 1793 and 37 Geo. III, c. 142, s. 8. The Law Department which was functioning at the time had nothing to do with legislation. Its chief duties "appear to have consisted in conducting the correspondence of the Government relative to the establishments of the Supreme Court and of the officers subordinate to it or to the other minor matters of a miscellaneous description connected with the Court". The work of the Department was transferred to the Judicial Department



the Charter Act of 1833 came into force,<sup>8</sup> but it could not fully meet the requirements of that Statute. From a legal point of view, it was necessary that laws should be enacted at the meetings of the Council which the Fourth Member was *entitled* to attend. To fulfil this requirement and to prevent any doubt being entertained on the subject, the resolution for the adoption of Act IV of 1835 used the following phraseology: "The said Act having been reconsidered at the meeting of the Legislative Council of India under this date . . . the Governor General in Council resolves that the Act be finally passed as".<sup>9</sup> But this expedient overcame only a part of the difficulty. The Court of Directors took exception to the Fourth Member's signing certain despatches not connected with the making of laws and Regulations, because "he could not be present at deliberations on such matters as a member of Council".<sup>10</sup> So long as a separate department for the consideration and enactment of laws was not created, it was difficult to maintain the distinction between the executive and the legislative proceedings and to observe the statutory direction that the Fourth Member was *entitled* to participate only in respect of the latter.<sup>11</sup> A new department entitled Legislative Department was, therefore, constituted by a resolution of the Council of 15 June 1835.<sup>12</sup> It was in existence till 20 May 1854 when the Legislative Council established under the Charter Act of 1853 took over.<sup>13</sup>

#### *Fourth Member and the non-Legislative Departments*

The statutory provision that the Fourth Member was entitled to attend the meetings of the Governor General's Council for

by a resolution of the Council of 26 January 1835. Bentinck's Minute dated 20 January 1835, Judicial (Civil) Pros., 19 February 1835, No. 7.

<sup>8</sup> For instance, Act I of 1835 was passed by the Political Department and transferred to the Judicial Department for issue. Judicial (Civil) Pros., 7 January 1835, No. 1.

<sup>9</sup> Judicial (Criminal) Pros., 13 March 1835, No. 28.

<sup>10</sup> Leg. Letter from Court, 8 July (No. 3) 1835.

<sup>11</sup> Leg. Letter to Court, 9 November (No. 7) 1835.

<sup>12</sup> Judicial (Civil) Pros., 15 June 1835, No. 6A.

<sup>13</sup> Leg. Letter to Court, 19 May (No. XI) 1854.

making laws and Regulations appeared at first to be a clear, simple and straight-forward direction, but great difficulties were experienced in interpreting and enforcing it. Lord Bentinck asked, "When and where does legislation begin? In every Council, particularly in the Political Department, questions have come before us appertaining to international law, reciprocal jurisdiction, claims for fugitives, &c., and again in the establishing an administration, comprehending the whole internal management, both in Mysore and Coorg, both countries not yet within the pale of our territories. Do such subjects come within the province of the Fourth Councillor's interposition? There are many representations and references to each Council in the other Departments, save the Military, upon which the question may and does often arise, whether some legal enactment should not take place. Is it at this stage of the deliberation, or when the framing of the law has been determined, that we are to call in the Fourth Member? There will be endless doubts upon this point and I will take the liberty of stating an opinion as to a result which will not have been in the contemplation of the inventor of this exclusion, that with this latitude of construction a Governor General, if he so fancies, will have it in his power to make a mere cypher of this important personage."<sup>14</sup> Apart from the practical difficulty of drawing a line with any precision between executive and legislative functions, on general grounds also, Lord Bentinck was clearly of the view that the restriction imposed by the Charter Act was not "well-considered". Like the Governors and the Governor General, the Fourth Member would be new to India, and in the interests of efficient legislation it was necessary for him to acquire as full a knowledge of the country and its problems as was possible. This he could best do only by attending all the meetings of the Council and by a perusal of the papers concerning all the Departments. "It cannot surely be advisable", he observed, "at the same time that you declare the Council, as heretofore constituted, to be lame and inefficient for the purposes of legislation, thus to blindfold the single guide appointed to conduct them in their way." Again,

<sup>14</sup> Minute dated 31 July 1834, Ootacamund Pol. Pros., 9 August 1834, No. 8.

the office of the Fourth Member, he felt, would always be filled "by a man of the first talent and of the highest attainments", and even in respect of non-legislative matters it was wrong to "cast away the prodigious benefit to be derived from such an adviser in a Council of four only to whom such mighty interests are entrusted".<sup>15</sup> Holding these views, he associated the Fourth Member in the proceedings of the Council in respect of all the Departments right from the beginning.<sup>16</sup> In pursuing this policy, the Governor General received the support of the Court of Directors. "Unless he [the Fourth Member] is in the habit of constant communication and entire confidence with his colleagues," the Directors observed, "unless he is familiar with the details of internal administration, with the grounds on which the Government acts, and with the information on which it is guided, he cannot possibly sustain his part in the legislative conferences or measures with the knowledge, readiness and independence essential to a due performance of his duty." Giving the most liberal construction to the statute, they made it clear that there was nothing in the law to preclude the Fourth Member from attending a meeting of the Council *on any occasion* when his presence was considered desirable, but care was to be taken that he exercised his vote only at the meetings convened for making laws and Regulations.<sup>17</sup>

Before long, however, the subject cropped up again in connection with the setting up of the Legislative Department and the drafting of the standing orders of that Department. H. T. Prinsep, a member of the Council, put forward the following proposal for maintaining the distinction between the executive and the legislative functions of the Council. Every legislative project was to originate in, and receive the approval of, the

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Public Letter from Court, 10 December (No. 44) 1834, para. 23. It appears that these directions were issued prior to the receipt of Bentinck's views. In replying to the above despatch, the Governor General in Council wrote, "We had anticipated the recommendation . . . by requesting the attendance and assistance of Mr. Macaulay at every sitting of our body." Leg. Letter to Court, 31 August (No. 3) 1835, para. 12.

appropriate executive Department, and it was then to be transferred to the legislative side for further consideration and enactment. In the case of proposals from the subordinate Governments, they were, as a rule, to be referred to the legislative side, since their rejection by the Council acting in its executive capacity would have been *ultra vires*. The Council sitting as a legislature was to have no direct communication with the Local Governments, the Law Commission or any other administrative body; it was to be the responsibility of the executive Department concerned to supply whatever information was required and render all necessary assistance.<sup>18</sup> While making this proposal, it is clear from the papers that Prinsep expected the convention associating the Fourth Member with the proceedings of all the Departments to continue without change. This proposal would have been unexceptionable if the Charter Act had established a full-fledged independent legislature, with membership materially different from that of the executive Government. As the Council was then constituted, the procedure that was suggested was likely to lend itself to grave abuse. Macaulay, in a spirited minute, reiterated the dangers pointed out by Lord Bentinck on an earlier occasion, and observed that it would be possible, if this procedure were adopted, for the executive side to perform all the acts incidental to legislation except that of formal enactment and reduce the Fourth Member to a mere cypher. There was no guarantee that the convention of permitting the Fourth Member to see every public document and to assist in every deliberation would be followed by a future Governor General. "I deny the legal right of the Council of India", he wrote, "to exclude the fourth member of Council while they are deliberating on a draft of a law in the Finance and Judicial Departments. I claim for myself and my successors a legal right to record an opinion and to give a vote, not merely on the final passing of a law, but on every question which may arise respecting a law in any of its stages."<sup>19</sup> In the solution that was finally adopted, the difficulties which were implicit in Prinsep's proposals were avoided "by a determination which

<sup>18</sup> Minute dated 17 June 1835, Leg. Dep. Pros., 6 July 1835, No. 10.

<sup>19</sup> Minute dated 13 June 1835, *ibid.*, No. 11.

was come to not to consider the Legislative Council as distinct from the Executive Council, but that there should be but one Council with a separate Legislative Department, the Fourth Member being understood to have a *legal* right to be present in any Department, when laws, or matters immediately connected with laws, might be under consideration".<sup>20</sup> This was in complete harmony with the policy pursued from the beginning at the instance of Bentinck.

During the time of both Bentinck and Auckland, the Fourth Member participated in the meetings of the Council and was shown papers in respect of all the Departments, but he signed its proceedings only in the Legislative Department.<sup>21</sup> In the non-Legislative Departments, he recorded minutes only occasionally when matters affecting legislation or involving constitutional or legal issues came up for consideration. There is nothing to show that he interfered in purely executive matters more than was legitimate or that his participation in the work of these Departments evoked any resentment.

Trouble started when Lord Ellenborough took over as Governor General in February 1842. He came to India with settled views adverse to the office of the Fourth Member and the Law Commission. He regarded the creation of the former post as a "job for Macaulay". When he was the President of the Board of Control in 1835, he had objected to the presence of Macaulay in the Governor General's Council on all occasions and written "a strong letter to India placing limits on the privileges of the legal member of the Council".<sup>22</sup>

<sup>20</sup> Leg. Letter to Court, 24 August (No. 2) 1835, para 101. Also, Prinsep's Minute, 22 June 1835, Leg. Dep. Pros., 6 July 1835, No. 10.

<sup>21</sup> An official memorandum on the subject prepared in November 1849 (Leg. Dep. Pros., 19 July 1850, No. 1) states that the Fourth Member "continued to be present at all meetings down to the close of the administration of Lord Auckland in February 1842." The statement is confirmed, except in the case of the Military Department, by an examination of the proceedings of the different Departments.

<sup>22</sup> A. H. Imlah, *Lord Ellenborough* (Harvard, 1939), p. 212. The letter appears to have been withheld by the Court of Directors and not actually sent to India. Parl. Papers, H. C. No. 533 of 1852, Q. 2292, and Hansard (III Series), Vol. CXXIX, p. 1428.

Soon after he assumed office as Governor General, "it was determined, without any note on the subject being placed on record, to restrict the attendance of the Fourth Member to meetings of the Legislative Council, unless invited specially when important matters connected with the judicial and revenue administrations might be under consideration".<sup>23</sup> This decision was "by no means in consequence of the opinions and wishes of the other members of the Council",<sup>24</sup> who held that the presence of the Fourth Member was both desirable and necessary, particularly in respect of matters concerning the Public Department.<sup>25</sup> It appears, in coming to this decision, Ellenborough acted on his own interpretation of the law and on his own authority. The Fourth Member, A. Amos, himself admitted that the course adopted by the Governor General was "in strictness quite legal" and "most consonant to the Act of Parliament".<sup>26</sup>

This issue cropped up again when a proposal for the abolition of the office of the Fourth Member and of the Law Commission was receiving active consideration. Viewing the question as a whole, the Court of Directors conveyed its decision not to dispense with the appointment of the Fourth

<sup>23</sup> Office Memorandum of November 1849, Leg. Dep. Pros., 19 July 1850, No. 1.

<sup>24</sup> Minute by Amos, 27 January 1843, Leg. Dep. Pros., 7 April 1843, No. 18.

<sup>25</sup> Minutes by W. W. Bird, T. H. Maddock and W. Casement recorded in connection with the proposed abolition of the office of the Fourth Member. Pol. Dep. Pros., 10 May 1843, Nos. 1-3.

<sup>26</sup> Minute dated 27 January 1843, Leg. Dep. Pros., 7 April 1843, No. 18. In his evidence before the Select Committee of Parliament, H. T. Prinsep testified that Amos did not object to his exclusion from the Council when it was discussing matters other than the legislative. "He said at once that he was quite aware that he was not entitled to sit there, and if the Council or any member of the Council objected to his sitting there, he would at once retire, and he did retire." Parl. Papers, H. C., No. 533 of 1852, Q. 889-90. See also evidence of Lord Ellenborough, *ibid.*, Q. 2292, and F. J. Halliday, Parl. Papers, H. C. No. 897 of 1852-53, Q. 1955-6. Sir Barnes Peacock, who was Fourth Member of the Council later on, held the same view as Amos on the subject. *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 32,

Member, and also instructed, "We desire that the presence of the fourth member of Council may not be restricted to meetings held for the purpose of passing laws and Regulations; but at the same time you will bear in mind, that at such meetings only he is entitled to a voice in your proceedings".<sup>27</sup>

Lord Ellenborough reacted violently and questioned the competence of the Court of Directors to issue an order which was contrary to the obvious meaning of the Charter Act and which interfered with the constitution of the Governor General's Council as established by law. Taking it that the order was merely an expression of the opinion of the Directors on the subject, he was willing to respect that opinion to the extent of permitting the Fourth Member to attend the meetings of the Council when matters other than legislative were being discussed, provided his presence was not "injurious to the public service", and "secrecy in Council and promptitude of action" permitted. He wanted it, however, to be clearly understood that every member of the Council had the constitutional right to require any person who was "not entitled to sit therein by the Act of Parliament" to be excluded on any occasion.<sup>28</sup> W.W. Bird and T. H. Maddock, members of the Council, reiterated their view that the Fourth Member should attend all the meetings, and be shown all the papers, of the Home Department, but they thought that his association with the work of the Military and Political Departments was not very necessary. Bird advanced further the view that a person who did not participate in the proceedings of the Government on the executive side was unfit to exercise legislative powers. He also suggested that the decision to exclude the Fourth Member from any of the meetings of the Council should be taken by the whole Council, and not at the instance of a single member as proposed by the Governor General.<sup>29</sup> Ellenborough,

<sup>27</sup> Leg. Letter from Court, 29 November (No. 22) 1843.

<sup>28</sup> Ellenborough's minute of 18 February 1844 forwarded to the Court of Directors on the same day. Leg. Dep. Pros., 16 March 1844, No. 1. See also his letter to Lord Ripon, President of the Board of Control, 4 July 1844 in Sir Algernon Law, *India under Lord Ellenborough* (London, 1926), p. 121.

<sup>29</sup> Leg. Dep. Pros., 16 March 1844, Nos. 2-3,

however, would not accept this view: for him it was necessary to state the law and "to guard jealously all the privileges of those who are alone entitled on all occasions to sit and vote in the Council of India".<sup>30</sup> C. H. Cameron, the Fourth Member at the time, in an unrecorded paper, dated 28 February 1844, and headed "protest", refused to enter into a discussion on the question of the legality of the orders of the Court of Directors, and made it clear that he would not withdraw from the Council unless he was directed to do so by the whole Council or by the Governor General in the exercise of the extraordinary power vested in him by Section 49 of the Charter Act.<sup>31</sup> The decision of the Council finally communicated to Cameron was to the effect that, subject to the requirements of "promptitude of action which is essential to the conduct of affairs in India", the Fourth Member would be shown "such important papers" relative to "the revenue and judicial administration of the country as would aid him in the better discharge of his duties," and he would also be requested to attend the meetings of the Council when such cases came up for discussion. No mention was made of the legal right of any member of the Council to require his withdrawal on any occasion.<sup>32</sup> Cameron agreed to the arrangement and promised co-operation.<sup>33</sup>

The relations between Lord Ellenborough and the Court of Directors had been most severely strained on a number of issues, and the former's despatch of 18 February 1844 on the subject only provided the occasion for his recall by a unanimous resolution of the Directors.<sup>34</sup> On the specific issue raised by the controversy, in their letter of 5 June 1844, they reiterated their view that it was perfectly legal to permit the Fourth Member to participate *without a vote* in the proceedings of the Council in respect of matters other than making laws and Regulations. They also accepted the view of the majority of the members of Lord Ellenborough's Council that it was unnecessary for the Fourth Member to attend when the Council was engaged in questions purely of a political or military nature.<sup>35</sup>

<sup>30</sup> *Ibid.*, No. 4.      <sup>31</sup> Leg. Dep. Pros., 19 July 1850, No. 1.

<sup>32</sup> Leg. Dep. Pros., 16 March 1844, No. 5.      <sup>33</sup> *Ibid.*, No. 6.

<sup>34</sup> A. H. Imlah, *Lord Ellenborough* (Harvard, 1939), pp. 224-6.

<sup>35</sup> Leg. Letter from Court, 5 June (No. 12) 1844.



As to the course of policy pursued from this time onward, it is noted in the office memorandum of November 1849, "Under the above arrangement, Mr. Cameron continued to see, in addition to the correspondence in the Legislative Branch, only such papers connected with the revenue and judicial administration as were of any importance; but since the assumption of the office of Fourth Member of Council by the Hon. Mr. Bethune, the whole of the papers of the Home Department are submitted for his perusal. There is nothing on record respecting this change of practice."<sup>35</sup> This policy continued without change in the time of Sir Barnes Peacock. "In my own case," he wrote, "I was allowed to see the papers and minutes of consultation in the Home and Legislative Departments, but I was ignorant of everything that was going on in the Foreign, Secret, Military and Financial Departments as if I had not been a Member of Council."<sup>37</sup>

In the time of Lord Dalhousie, the competence of the Fourth Member to record a minute in a non-Legislative Department came to be questioned. This was in connection with the measures taken by the Government of Madras to prevent breach of peace on a certain occasion.<sup>38</sup> W. Currie pointed out that the subject under consideration was "one of pure executive policy, involving no legal, judicial or revenue question",<sup>39</sup> and objected to the Fourth Member recording a minute. He was supported in this view by the President of the Council, Maj. Gen. J. H. Littler. Under the instructions of the Court of Directors, he observed, the Fourth Member was entitled to be *present* at all the meetings of the Home Department, but "as regards the executive Departments of that administration, he should take no part in the deliberations of the Council, except when the Council shall expressly desire to avail themselves of his assistance". He was, however, willing to

<sup>35</sup> Leg. Dep. Pros., 19 July 1850, No. 1.

<sup>37</sup> Minute dated 3 November 1859, *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 32.

<sup>38</sup> Leg. Dep. Pros., 19 July 1850, No. 1.

<sup>39</sup> Minutes dated 29 November 1849 and 20 June 1850, *ibid.*, Nos. 2 and 8.

concede the right of minuting to the Fourth Member whenever his assistance was so sought.<sup>40</sup>

Bethune, the Fourth Member, replied that he had on many previous occasions recorded minutes on non-legislative questions and they had been sent to the Court of Directors. If he had the right to tender advice orally on any occasion, he had also the right to present his views in writing. If it was laid down that he should tender advice only on request, it would give occasion to differences in the Council over the issue whether his advice should be sought on a particular question. This would place him in a derogatory position *vis-a-vis* the other members of the Council, and also make his presence at the meetings of the Public Department in obedience to the orders of the Court of Directors an empty form. He made it clear that he would not like to be associated with the work of the Department unless it was fully understood that he was free to exercise his judgment in the matter of giving his opinion, either orally or in writing, at all the meetings at which he was requested to "attend and assist". Going a step beyond the point under consideration, he suggested that, in the interests of both executive government and legislation, they should revert to the practice observed in the time of Macaulay, and the Fourth Member should be associated with the proceedings of the Foreign Department also.<sup>41</sup>

As regards the issue raised by Currie, Lord Dalhousie fully supported the stand taken by Bethune and held that under the instructions of 1844 the Court of Directors did not intend the Fourth Member to be a silent witness of the proceedings of the Home Department, and it was clearly intended that in such proceedings he should be in the same position as any other member of the Council, excepting in respect of voting. But he hoped that the Fourth Member would exercise his right to record a minute "with discretion and tact . . . only in matters which appear to be of importance and it will not be called into play on papers connected with the ordinary routine of executive administration in the Home Department". Like Bentinck

<sup>40</sup> Minute dated 7 June 1850, *ibid.*, No. 7.

<sup>41</sup> Minutes dated 12 April and 29 June 1850, Leg. Dep. Pros., 19 July 1850, Nos. 4 & 9. See also note 111 on p. 57 above,

and Auckland earlier, however, Dalhousie felt that the statutory restriction on the duties and powers of the Fourth Member as a member of the Council should be removed.<sup>42</sup>

On a reference being made to it, the Court of Directors endorsed the stand taken by Dalhousie using a different phraseology: that in the non-Legislative Departments the Fourth Member was to be free to express his views orally or in writing, but his sentiments were not to be "placed on record".<sup>43</sup>

The long-standing dispute over the relations of the Fourth Member with the non-Legislative Departments came to an end finally only with the passing of the Charter Act of 1853.

### *Special Role of the Fourth Member in the Work of Legislation*

Although the concurrence of the Fourth Member to laws, nor even his presence at the meetings of the Governor General's Council for enacting them, was necessary for their validity,<sup>44</sup> he was expected to play a pre-eminent part in the work of legislation. The Court of Directors described what was expected of him in the following terms: "He has indeed no pre-eminent control over the duties of this [Legislative] Department, but he is peculiarly charged with them in all their ramifications. His will naturally be the principal share, not only in the task of giving shape and connexion to the several laws as they pass, but also in the mighty labour in collecting all the local information, and calling into view all those general considerations which belong to each occasion, and of thus enabling the Council to embody the abstract and essential principles of good government in regulations adapted to the peculiar habits, character and institutions of the vast and infinitely diversified people under their sway."<sup>45</sup> To enable

<sup>42</sup> Minute dated 29 May 1850, *ibid.*, No. 6. Sir William Lee-Warner states somewhat incorrectly, "The Governor General felt that Bethune was lacking in tact and too meddling. The latter tendency he checked by making a rule that except on legislative business that member should not record minutes." *The Life of the Marquis of Dalhousie* (London, 1904), Vol. I, p. 300.

<sup>43</sup> Leg. Letter from Court, 3 January (No. 1) 1851.

<sup>44</sup> Pol. Letter to Court, 9 August (No. 10) 1834.

<sup>45</sup> Public Letter from Court, 10 December (No. 44) 1834, para 21,

him to discharge his duties better, and also to bring into harmony the work of the Law Commission with that of the Council, he was invariably appointed Chairman of the Commission.

The persons appointed to the office of the Fourth<sup>46</sup> or Legislative Member were all men of very high calibre. Thomas Babington Macaulay,<sup>47</sup> the first to hold the office, had, as a member of the governing Whig Party and the Under Secretary of State, taken a leading part in fashioning the Charter Act of 1833. After his retirement in 1838, he was succeeded by Andrew Amos, an eminent lawyer and professor, and a member of the first English Criminal Law Commission. Charles Hay Cameron,<sup>48</sup> who succeeded in 1843, was a well-known disciple of Bentham, and had been a member of the Indian Law Commission since its inception in 1835. He was in turn followed by John Drinkwater Bethune,<sup>49</sup> Counsel to the

<sup>46</sup> The tenure of the office of the Fourth Member was not fixed either by the Charter Act of 1833 or that of 1853. Opinion was sometimes expressed that the period should be the same as for the other members of the Council, namely, five years. Leg. Letters to Court, 5 August (No. 23) 1842 and 4 September (No. 27) 1847. Macaulay resigned and Bethune died long before the expiry of the period, while Amos and Cameron resigned about the end of it. Peacock, however, continued for over seven years.

<sup>47</sup> According to Elic Halvêy, two currents of influence converged to make the appointment. Charles Grant at the head of the Board of Control was an Evangelical and Macaulay, although distinctly latitudinarian in outlook, belonged to an Evangelical family. James Mill, who wielded enormous influence with the Court of Directors, saw in Macaulay, despite his Whig outlook, a convert to Utilitarianism. *The Triumph of Reform, 1830-1841* (London, 1950), p. 228. See also Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), p. 191.

<sup>48</sup> Leslie Stephen described Cameron as "a disciple and ultimately the last disciple of Jeremy Bentham." Sir George Claus Rankin, *Background to Indian Law* (Cambridge, 1946), p. 20.

<sup>49</sup> The relations of Bethune with Dalhousie and other members of the Council appear to have been far from cordial. W. Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904), Vol. 1, p. 300. Writing to Hobhouse, President of the Board of Control, on 23 October 1850, Dalhousie observed, "He [Bethune] likes schooling better than law making; and all the Governors General together since Job Charnock will not make him stick to the latter occupation." British Museum, Add. Mss., 36477, f. 287.

Home Office in England. The last of the lawyers to hold the post was Sir Barnes Peacock, who was Queen's Counsel in 1850. He took over in April 1852, and relinquished the post in June 1859 on his elevation to the office of the Chief Justice of the Supreme Court at Calcutta. While all these persons were clever and able and did much useful work, success in legislation depended mostly on the attitudes and ideas of the other members of the Governor General's Council, who constituted the executive government, and commanded an overwhelming majority in its legislative sittings. The members of the Council acted according to their conscience in expressing their views and exercising their votes, and there was no rigid line separating the Fourth Member from his colleagues. But, speaking generally, there was a distinct difference in approach between the two, arising out of their different backgrounds and respective situations. The persons who held the office of the Fourth Member were all English lawyers, greatly influenced by the spirit of legal reform in the air in England, and they devoted all their time and energy to the subject of legislative reform. Their mind was active in searching for ways and means of improving the state of law, and they took more kindly than their colleagues to the Law Commission and its general schemes of reform. The other members of the Council were hardboiled administrators. Their time and energy were mostly taken up with the affairs on the executive side, and they had not much time to spare for the work of legislation. With the notable exception of Alexander Ross,<sup>50</sup> they were inclined to let things alone, unless there was ostensible and pressing demand, and they were suspicious of any new measure, especially the general schemes of reform propounded by the Law Commission. This difference in approach, as will be further explained in assessing the work of the Commission, was implicit in the handling of every legislative measure, and it largely determined the pace and pattern of progress in the field of legislation.

<sup>50</sup> Ross, a member of the Council under Bentinck and Auckland, was a fervent Benthamite. For a clear exposition of his ideas, see Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), pp. 234-7 et. seq.

*Proposal to abolish the Office of the Fourth Member*

In spite of this difference in approach to problems, the relations of the Fourth Member with his colleagues in the time of Bentinck and Auckland were cordial, and his position was quite secure. The situation greatly altered with the coming in of Lord Ellenborough as Governor General in February 1842. He held strong views opposed to the continuance of the office of the Fourth Member and of the Law Commission, and soon after he assumed charge, as described earlier, he brought to an end the association of the Fourth Member with the proceedings of the non-Legislative Departments, a practice which had worked smoothly for over seven years. His action brought to a head the growing dissatisfaction with the working of the legislative machinery.<sup>51</sup> In March 1843, the Court of Directors considered that the resignation of Amos from the office of the Fourth Member provided a fitting opportunity for a reconsideration of the whole issue and invited the views of the Government of India.<sup>52</sup> In doing so, the Directors expressed the view, "The drafts of laws which are to affect the rights of British subjects in India and to be binding on the Supreme Court, without the necessity of registration, must necessarily pass under the revision of one or more persons, thoroughly conversant with English law."<sup>53</sup> Ellenborough's reply was strongly worded and pungent. He was on principle opposed to the appointment of an English lawyer, who, having no living contact with the conditions in India, would try to import English ideas on every matter, and this might prove quite dangerous to

<sup>51</sup> The connected question of the abolition of the Law Commission is considered in the next chapter.

<sup>52</sup> The Court of Directors instructed that the vacancy following the resignation of Amos should not be filled in for the time being, unless it was found necessary under Section 48 of the Charter Act of 1833, i. e. to secure a quorum in the Council. Prior to the receipt of this instruction, however, the Government of India had appointed C. H. Cameron to the post temporarily, and this was justified on the ground that no legislation could legally be undertaken when the office of the Fourth Member was lying vacant. Parl. Papers, H.L. No. 20 III of 1852-53, pp. 593-4, and Leg. Letter to Court, 12 May (No. 9) 1843.

<sup>53</sup> Leg. Letter from Court, 1 March (No. 3) 1843.

the security and contentment of the people. Further, being confined to his legislative duties and "having hardly anything really to do", the Fourth Member would look "to the right and left in order to find the matter of the new Act of the Legislature", and this would inevitably lead to the evils of over-legislation in a country which was accustomed to be governed by custom rather than state-made laws. He believed that "if a person of really superior qualifications was appointed as Advocate General" there would be no need for a Fourth Member.<sup>54</sup> But, the other members of his Council—W. W. Bird, T. H. Maddock, W. Casement and C. H. Cameron—were of the opinion that the presence of a person with legal training was absolutely necessary, and the appointment of the Advocate General or of the Chief Justice was open to serious objections. Cameron pointed out that the Fourth Member was not a "Legal Adviser" but a "Legislative Adviser", and the Advocate General was not fit to play the latter role.<sup>55</sup> Bird expressed the general view of his colleagues, excepting the Governor General, when he wrote, "In short, although the present arrangement is not what it ought to be, it is not easy to determine what should be substituted instead of it, and a Law Member in some shape or other is as all must admit indispensably necessary."<sup>56</sup> In the light of this opinion, the Court of Directors came to the conclusion "that the appointment of the Fourth Member of the Council cannot without detriment be dispensed with."<sup>57</sup> There was no further challenge to the continuance of the office, and, on a later occasion, with reference to the discussions of 1843, Dalhousie expressed the view that the presence of the Fourth Member in the Council was not only valuable but necessary.<sup>58</sup>

<sup>54</sup> Leg. Letter from the Governor General to the Court, 22 April 1843.

<sup>55</sup> Minute by Cameron, 17 November 1843, Leg. Dep. Pros., 23 December 1843, No. 1. Amos had expressed similar views on the subject in his minute dated 27 January 1843. Leg. Dep. Pros., 7 April 1843, No. 18.

<sup>56</sup> Minute by W.W. Bird, 4 May 1843, Leg. Dep. Pros., 10 May 1843, No. 1. See also minutes of T. H. Maddock, W. Casement and C. H. Cameron, *ibid.*, Nos. 2-4.

<sup>57</sup> Leg. Letter from Court, 29 November (No. 22) 1843.

<sup>58</sup> Minute dated 29 May 1850, Leg. Dep. Pros., 19 July 1850, No. 6.

*Governor General's Relations with his Council*

The Governor General, like the Fourth Member whose role we have so far considered, also occupied a special position in the Legislative Council. When he was on tour, as stated earlier, no law or Regulation could be made by the Council without obtaining his assent in writing. This restriction had only the value of a suspensory veto on legislation until such time as the Governor General and his Council could meet together and thrash out their differences. Except in urgent cases, every Bill was referred to the Governor General before it was published for eliciting public opinion,<sup>59</sup> and his formal assent, as required by law, was given to it at this stage or at a later stage. Strictly construed, the Governor General was entitled under the law only to give or withhold his assent; he had no power to direct the Council to enact any particular measure.<sup>60</sup> In practice, however, the Governor General expressed his opinions freely, whether a measure was to be proceeded with, what modifications were necessary, etc. and the Council tried to accommodate them as far as possible.<sup>61</sup>

<sup>59</sup> Draft Bill in respect of Act V of 1839, providing remedies for the defects in the excise laws of the Straits Settlements, was published prior to being referred to the Governor General as was the usual practice, because the measure was urgently required and no new principles were involved. Leg. Letter to Court, 20 May (No. 12) 1839, paras 79-86. After the episode of the Assam Company Bill, a resolution was passed reaffirming the procedure which had come to be neglected; "Except in urgent cases, drafts of Acts will not be promulgated for general information without the assent of the Governor General for such promulgation." Leg. Dep. Pros., 20 September 1845, No. 11.

<sup>60</sup> The Governor General wrote to the Government of Bombay on 18 February 1839, "Except to the extent of giving or withholding assent, the power of absolute interference in matters of legislation is beyond the province of the Governor General." Leg. Dep. Pros., 25 March 1839, No. 2.

<sup>61</sup> For example, at the instance of the Governor General, Europeans were made amenable to the jurisdiction of Munsiffs in respect of only revenue cases under Act III of 1839, and not in respect of all matters as was originally proposed. Leg. Dep. Pros., 17 December 1838, Nos. 9-10. A Bill to provide for the punishment of village Chaukidars, which was put forward by the Government of Agra, was dropped in view of the



As the law was normally construed and applied, the Governor General, when he was not separated from his Council, had no authority to overrule its decisions, or act according to his own judgment, in matters concerning legislation. His position was the same as that of any other member of the Council, except for the casting vote. Although his legal position was not strong, he wielded great personal influence as the head of the Government. It is only on rare occasions, such as in the case of the Assam Company Bill in the time of Ellenborough, that he found himself pitched against his whole Council, and relations became very much strained.<sup>62</sup> When opinion was sharply divided over any measure, the tendency was generally to seek a middle way, or postpone the enactment of the measure if it was not of an urgent nature, or refer the matter to the Court of Directors for orders.<sup>63</sup>

There was, however, a view that the Governor General had authority to overrule his Council in legislative matters even when he was not separated from it. Under the Charter Act of 1793, the Governor General and the Governors could overrule and act independently of their respective Councils in purely executive matters, but they could not do so in respect of legislation or taxation.<sup>64</sup> Section 49 of the Charter Act of 1833 provided that the Governor General might overrule his Council and act according to his own judgment in respect of "any measure" affecting "the safety, tranquillity, or interests of the British possessions in India", but the exceptions specified in the 1793 Charter were not repeated. The re-enactment of the provision without the limitations provided a *prima facie* case for the claim that the Governor General had authority

objections raised by the Governor General. Leg. Dep. Pros., 2 April 1838, Nos. 26-31.

<sup>62</sup> Leg. Letter to Court, 14 September (No. 19) 1844.

<sup>63</sup> Of the measures which were postponed or referred to the Court of Directors for want of sufficient agreement, mention may be made of the *lex loci* proposal and the Penal Code. Act V of 1843 regarding slavery is a fine example of how in the face of sharp differences of opinion a solution that was generally acceptable was found.

<sup>64</sup> 33 Geo. III, c. 52, ss. 47-51.

to overrule his Council in all matters, executive as well as legislative, and on all occasions.

This question first came up for consideration from a remark of Macaulay that the opposition of the Fourth Member might, at times, prevent "the Executive Council from carrying its purposes into effect, or may force the Governor General to have recourse to his extraordinary authority".<sup>65</sup> In effect he held that the Governor General could exercise his special power in respect of a matter under the consideration of the Council sitting in its legislative capacity. But, according to the law officers of the Company and the Crown, whom the Court of Directors consulted, the object of the relevant provisions of the different enactments applicable to the Governor General of India in this matter<sup>66</sup> was to strengthen the *executive* government and, as such, the special power referred to could not have been intended to apply to measures strictly *legislative*, and the specific restrictions imposed by the earlier enactments still held good.<sup>67</sup>

The issue cropped up again in the time of Lord Ellenborough in connection with a Bill for the incorporation of the Assam Company, which was formed to develop the tea industry. The Court of Directors, in consultation with the proprietors of the Company, prepared a draft measure and sent it to India in 1841. The President in Council revised the draft in consultation with the representatives of the Company in India, and informed the latter on 21 April 1843 that the Government of India would be prepared to enact the revised draft. These proceedings took place "during the absence and without the cognizance of" Ellenborough.<sup>68</sup> When the draft Bill was sent to him as required by law, he declined to give his assent, raising a number of objections.<sup>69</sup> Even after

<sup>65</sup> Minute dated 27 June 1834, Ootacamund Pol. Pros., 9 August 1834, No. 7.

<sup>66</sup> 26 Geo. III, c. 16, s. 7; 33 Geo. III, c. 52, s. 47; and 3 & 4 Wm. IV, c. 85, s. 49.

<sup>67</sup> Leg. Letter from Court, 27 February (No. 1) 1835. Apparently Macaulay acquiesced in this opinion. See his minute dated 13 June 1835, Leg. Dep. Pros., 6 July 1835, No. 11.

<sup>68</sup> Leg. Letter to Court, 14 September (No. 19) 1844.

<sup>69</sup> Original Leg. Consultations, 14 September 1844, No. 1.

he rejoined the Council, he persisted in his opposition and declined to carry out the injunctions of the Court of Directors in this respect.<sup>70</sup> He did not state under what authority he was obstructing the progress of the measure. It was presumed by his successor, Lord Hardinge, that he had acted under the powers vested in him by Section 49 of the Charter Act of 1833.<sup>71</sup> Soon after this crisis developed, in July 1844, Ellenborough left India, having been recalled by the Court of Directors by a resolution of 24 April 1844, owing to differences arising over other matters. Hardinge refused to reopen the case without the specific orders of the Court of Directors, both in respect of the constitutional issue raised by his predecessor's action and on the merits of the proposed Bill. Advice was, therefore, sought on the following questions—"Whether against the opinion and advice of a majority in Council, the Governor General's veto is a valid bar to the passing of an Act, and whether under any clause of the Act 3 & 4 Wm. IV, cap. 85, the Governor General can when present be compelled to pass an Act by the majority of his Council, which he has an undoubted right to refuse to pass when absent?"<sup>72</sup> The Solicitor General, who was consulted by the Court of Directors, expressed the view that Section 49 of the Charter Act of 1833, on which alone any such claim could be based, referred only to executive matters, and a veto power in respect of legislation was not conferred by it.<sup>73</sup>

<sup>70</sup> In his minute of 10 March 1844, Ellenborough wrote, "I have great misgivings with respect to the object and to the probable effect of this Act, and I cannot conscientiously concur in passing it without the securities I have suggested; but even with these securities I should not like either the Act itself or the principle of our passing such an Act here. If the authorities in England are satisfied [that] the desired privileges ought to be given to the Company, not for their interest alone, but that of the public, which is the only justifiable ground on which such privileges could be granted, let them apply for a Royal Charter or allow the speculators to undergo the ordeal of a Parliamentary inquisition. I am not prepared to take upon myself any fraction of the responsibility of granting the privileges sought." *Ibid.*, No. 7.

<sup>71</sup> Hardinge's minute, dated 16 August 1844, *ibid.*, No. 9.

<sup>72</sup> Leg. Letter to Court, 14 September (No. 19) 1844.

<sup>73</sup> Leg. Letter from Court, 3 January (No. 2) 1845. The Bill in dispute was finally passed into law as Act XIX of 1845.

There appears to have been no revival of the controversy again. Under the Charter Act of 1853, the assent of the Governor General was made necessary for the validity of laws "whether he shall or shall not have been present in Council at the making thereof".<sup>74</sup>

### *The New Legislative Process*

In the early years of the Company's rule there was no set procedure for the enactment of laws and no prescribed form in which they were to be drafted. The executive and the legislative functions were in the same hands and often the Regulations of the period could hardly be distinguished by their form from the general policy directives of the executive. When Lord Cornwallis took over as Governor General, he found that the Regulations exhibited poor draftsmanship and *there was no regular system for giving authenticity and publicity to them*. Some of them were not even printed, and the general public, and even officials, had no ready access to them.<sup>75</sup> Therefore, he addressed himself to the problem, and his Regulations XX and XLI of 1793 were the first great steps in the direction of improving the process and technique of legislation. The former empowered magistrates and other high officers of the Government to submit draft proposals through the Sadr Courts, and laid down the procedure to be observed in this respect. The latter laid down that Regulations issued by the Government should be duly registered in the Judicial Department to give them authenticity. They were to be properly numbered and formed into regular codes, printed and translated in the languages of the country, and made easily available to the public. Every Regulation was to contain a preamble explaining the grounds for its promulgation. Certain other instructions as to the mode of drawing up a Regulation were also given by it.<sup>76</sup> The procedure evolved in Bengal was later extended to, or was adopted by,

<sup>74</sup> 16 & 17 Vict., c. 95, s. 24.

<sup>75</sup> B. K. Acharya, *Codification in British India* (Calcutta, 1914), p. 51.

<sup>76</sup> The principles contained in Regulation XLI of 1793 were later embodied in 37 Geo. III, c. 142, s. 8.

Madras and Bombay.<sup>77</sup> Important as these reforms were, they did not lay sufficient emphasis on due deliberation and on consultations with the interests concerned prior to legislation. There was no system of publishing draft measures under consideration or of inviting public opinion on them. Even the consultations with public officials, as Holt Mackenzie observed, were neither systematic nor obligatory.<sup>78</sup>

When the Charter Act of 1833 came to be enacted, the only aspect of legislative procedure that attracted the special attention of Parliament was, as on earlier occasions, the authentication and promulgation of laws, and the Court of Directors was directed to frame rules for the purpose with the assent of the Board of Control.<sup>79</sup> The instructions which were issued accordingly had nothing novel about them; they only stressed afresh the need for better publicity to Government enactments.<sup>80</sup> To make the production of authenticated copies of Acts easy, the Government of India passed Act of 1835, which laid down that the fact of an Act having been passed by the Governor General in Council might be proved by the production of the Government Gazette containing it. Instructions were also issued that "all laws to whatever Presidency referring should be circulated to the public officers of each Presidency by their respective Governments, and that translations of such as should be operative in any Presidency should be made into the languages of the Provinces wherein they should have effect".<sup>81</sup>

Of far greater importance was the procedure to be observed in maturing legislative measures. The Court of Directors, in their letter of 10 December 1834, left the matter to be decided by the Government of India, laying stress on the point that it was "a matter of nicety and to be settled with much thought and care". The Directors pointed out that India did not have those restraints against "rash or thoughtless legislation" available in England, and they should be on their guard

<sup>77</sup> See notes 32 and 33 on p. 11 above.. Also, Bombay Regs. II of 1812 and I of 1827, and Madras Regs. I and X of 1802.

<sup>78</sup> Parl. Papers, H.C. No. 735 I of 1831-32, Q. 813 & 827-32.

<sup>79</sup> 3 & 4 Wm. IV, c. 85, s. 47.

<sup>80</sup> Parl. Papers, H.C. No. 187 of 1835.

<sup>81</sup> Leg. Letter to Court, 24 August (No. 2) 1835,

"against the hazard of precipitance". They further observed, "We deem it of great moment, therefore, that you should by positive rules provide that every project or proposal of a law shall travel through a defined succession of stages in Council before it is finally adopted; that at each stage it shall be amply discussed; and that the intervals of discussion shall be such as to allow to each member of Council adequate opportunity of reflection and inquiry."<sup>82</sup> They were also conscious of the desirability of obtaining the views of the public on legislative projects. While leaving the matter to be decided by the Government of India, in their letter of 27 December 1833, they observed that publication of Bills for this purpose might be limited to "laws of peculiar importance", and to do this in the case of every Bill seemed to them to be "superfluous, if not impracticable".<sup>83</sup>

The Standing Orders adopted by the Governor General's Council under these instructions were mainly as drawn up by Macaulay on good Benthamite principles.<sup>84</sup> He defined his basic approach to the problem in the following words: "We ought to provide securities against precipitate legislation. We ought to insure a fair hearing to the minority however small. We ought to reserve to ourselves the power in great emergencies of legislating with the utmost promptitude, and yet to put this power under such checks as may render it very difficult for ourselves or our successors to abuse it. We ought to give to the public an opportunity of expressing its opinion concerning our laws before they are finally passed."<sup>85</sup> Opposition to these proposals came from H. T. Prinsep, who felt that they were too formal. He did not accept the view that if there were no fixed rules the minority in the Council would not receive proper courtesy and consideration.<sup>86</sup> In reply, Macaulay pointed out that the Council of the Governor General had not been free from faction in the past, and it would be unwise to presume that ordinary rules of politeness

<sup>82</sup> Public Letter from Court, 10 December (No. 44) 1834, paras 14-16.

<sup>83</sup> Pol. Letter from Court, 27 December (No. 18) 1833, para 17.

<sup>84</sup> Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), p. 194.

<sup>85</sup> Leg. Dep. Pros., 6 July 1835, No. 7.

<sup>86</sup> *Ibid.*, No. 10.

would be a sufficient safeguard for the future.<sup>87</sup> There was something to say in favour of Prinsep's view as the Council was very small and had only official members. But the Standing Orders which were adopted were only nine in number and far from elaborate. They laid a much needed stress on due deliberation and wide consultation, both official and non-official, prior to legislation, and they suffered from none of the shortcomings attributed to the orders framed by the Council under the next Charter Act.

The Standing Orders<sup>88</sup> provided first that draft laws taken up for consideration by the Council should be printed and published for general information with a view to elicit public opinion. No provision was, however, made for publishing them in Indian languages. It was also not considered desirable to provide by formal rule what official bodies or what particular classes of persons should be specially consulted. The Government was to be guided in these matters by progressive experience. Next, to ensure due deliberation, no draft law was to be ordered to be published till at least one week had elapsed from the day on which it was placed before the Council, and at least six weeks were to elapse between the first reading and the final enactment of a measure. Since the time allowed between the two readings was found insufficient, it was extended in 1838 to two months in respect of measures applicable to the Presidency of Fort William and three in respect of those applicable to the subordinate Presidencies.<sup>89</sup> It was open to the Council to allow a longer time if it was considered necessary in any particular case. Again, if at the second reading of a Bill any material amendment was effected, the Bill as amended was to be republished for general information and the same interval allowed as before for the next reading. Again, any one member of the Council could propose a law, there being no rule for its being seconded. This was a correct step in view of the smallness of the Council. In cases of difference of opinion, it was open to any member to record

<sup>87</sup> *Ibid.*, No. 11.

<sup>88</sup> *Ibid.*, No. 12. Also, Leg. Letter to Court, 31 August (No. 3) 1835, paras 13-15.

<sup>89</sup> Leg. Dep. Pros., 1 October 1838, No. 21,

his views and require the other members also to do so. And lastly, the Council, by a unanimous resolution, could suspend forthwith any of the Standing Orders, recording the reasons for the step taken. If there was no unanimity on the point, the dissenting member could obtain an adjournment of 24 hours. If the majority, including the Governor General or the President of the Council for the time being, was still for suspending the Standing Order, it was to be suspended and not otherwise.<sup>90</sup>

One important question considered in connection with the Standing Orders was the advisability of publishing the proceedings of the Council in respect of legislation for general information. In making this proposal, A. Ross, known for his radical ideas, observed that "this would afford the Indian community advantages of the same kind as those which the public in England derive from the reported speeches of the members of Parliament on questions of legislation".<sup>91</sup> Macaulay was greatly impressed by the idea. In his view it was imperative that some suitable means be thought of for defending the Government's policy against the criticisms of a free press. The only mode he could envisage was the publication of the minutes of the members of the Council.<sup>92</sup> Bentinck<sup>93</sup> and Metcalfe<sup>94</sup> were strongly opposed to such a proposal. They felt that dissensions among the members would be exposed to the public eye, and the effect of the exposure would be to aggravate conflicts within the Council and also to bring

<sup>90</sup> Rules 8 & 9. Leg. Dep. Pros., 6 July 1835, No. 12.

<sup>91</sup> Leg. Dep. Pros., 6 July 1835, No. 8, and 27 July 1835, No. 5.

<sup>92</sup> Macaulay observed, "The passions which are, I fear, inseparable from public controversy might prove too strong for the restraint either of official or of social decorum. A class of feelings hitherto unknown among the members of the Council might arise, the vanity, the jealousy, the morbid irritability of professed authors engaged in a hot competition with each other for the favour of the public. These would indeed be great evils. But whether great as they are it might not on the whole be better to incur the risk of them than to leave our measures unaccompanied by one word of explanation or defence to the mercy of hostile journalists is a question which I would gladly see referred to for the consideration of the Home authorities." Leg. Dep. Pros., 27 July 1835, No. 3.

<sup>93</sup> *Ibid*,

<sup>94</sup> Leg. Letter from Court, 1 March (No. 4) 1837, para 25,



down the prestige and authority of the Government. H. T. Prinsep, another member of the Council, was opposed to the publication of the proceedings as a matter of course; but he saw no objection to occasional publication in special cases as had been done lately in the Salt Department, even though it involved publicity to differences within the Council.<sup>95</sup> In view of the sharp difference of opinion on the subject, the question was referred to the Court of Directors for orders, and the Court's decision was not favourable.<sup>96</sup>

Coming to the new legislative process in operation, in accordance with the Standing Orders, draft Bills were published in the Calcutta Gazette, and the subordinate Governments were directed to publish them in the local Gazettes also. But these publications in English were of very limited appeal and utility. While there was much talk of consulting public opinion, surprisingly enough, the question of publishing translations in Indian languages did not receive specific consideration in the various minutes recorded when the Standing Orders were framed. About this time, there was a request from the Accountant General of Bengal for the supply of a translated version of the draft Bill concerning the monetary system of India for the use of the bankers of Calcutta, a measure of the greatest importance to the mercantile world and the community at large. The Government of India replied that the persons interested might have it translated at their own cost.<sup>97</sup> Again, in 1837, while admitting the value of publishing translations in ascertaining the views of the Indian community, the Government of India observed that this would result in "the sacrifice of much time", besides there being "other objections in the present state of society to

<sup>95</sup> Leg. Dep. Pros., 27 July 1835, No. 4.

<sup>96</sup> Leg. Letter from Court, 1 March (No. 4) 1837, para 25. In this connection it is of interest to note that on 27 May 1835 a resolution was passed in the General Department that copies of the minutes of the members of the Supreme Government should not be sent "to the subordinate Governments or authorities on any occasion of a reference being made to them arising out of such minutes." A copy of the resolution was sent to the Legislative Department. Leg. Dep. Pros., 15 June 1835, No. 13,

<sup>97</sup> Leg. Dep. Pros., 3 August 1835, Nos. 23-4,

invite the opinions of the entire native community on the legislative projects of Government".<sup>98</sup> But, before long, there was a change in the views of the Government of India. In 1840 the Court of Directors was informed that arrangements had been made in the Bengal Presidency for the publication of Government Gazettes in Persian, Urdu and Bengali and, among other things, they would contain drafts of proposed laws.<sup>99</sup> The Governments of Madras and Bombay did not, however, follow the lead immediately; in 1852 only the latter issued orders for the publication of translations of draft bills.<sup>100</sup>

In publishing translations of Bills and Acts, the new policy was to prefer the regional languages to the ancient court languages. Thus, Persian had gradually to give place to Bengali and Urdu,<sup>101</sup> and Marathi to Gujarati and Kanarese,<sup>102</sup> in the regions in which the latter were current. Great difficulty was experienced in translating technical terms, and in certain cases the rule regarding publication of translations had to be dispensed with.<sup>103</sup> There was at times gross delay in the publication of translations. This meant, in the case of draft Bills, there was less opportunity for the people to express their views.<sup>104</sup>

There was considerable elasticity in the time allowed between readings of Bills. A much longer time than that prescribed by the Standing Orders was often allowed, depending upon the requirements of each case. The consideration of certain measures was quite prolonged, involving republication of Bills in view of material amendments made in them. The basic standards set up to ensure due deliberation were, however, at

<sup>98</sup> Leg. Dep. Pros., 8 May 1837, No. 1.

<sup>99</sup> Leg. Letter to Court, 3 February (No. 3) 1840. Also, Leg. Letter from Court, 24 June (No. 7) 1840.

<sup>100</sup> Leg. Dep. Pros., 3 September 1852, Nos. 3-4.

<sup>101</sup> Leg. Letters to Court, 3 February (No. 3) 1840, and 10 May (No. 9) 1841, paras 41-3. Leg. Letter from Court, 24 June (No. 7) 1840.

<sup>102</sup> Leg. Dep. Pros., 28 December 1835, Nos. 37-9, and 18 January 1836, No. 4.

<sup>103</sup> Leg. Letter to Court, 16 November (No. 19) 1840, paras 47-50. Leg. Letter from Court, 27 April (No. 6) 1842, para 17.

<sup>104</sup> Petition from the British India Association, 29 April 1852, Leg. Dep. Pros., 4 June 1852, No. 2, Leg. Letter to Court, 30 September (No. 18) 1852.

times grossly ignored. This was particularly true of the years 1836 and 1837 when Macaulay was a member of the Council.<sup>105</sup> The facts bear a striking contrast to the rhetorical emphasis placed by him on the necessity of placing efficient checks on the authority of the Council. The normal procedure was departed from in respect of no less than 13 out of 70 measures enacted during this period. The grounds advanced for setting aside the Standing Orders show that the Council did not as yet fully appreciate the spirit of the new procedure. In the case of Act III of 1836 for the abolition of the cattle duty in Salsette, an exception was made on the plea that "the local Government were anxious to give the community the proposed relief as early as possible", and "the provisions of the enactment were not of a nature to admit of objections being urged on the part of individuals."<sup>106</sup> In the case of Act XI of 1837 for the removal of inconveniences experienced in the entry and clearing out of vessels in the Bombay Presidency, the Standing Orders were suspended on the presumption that the public could possibly have no objection as it was solely meant for their relief.<sup>107</sup> In the case of Act VIII of 1837 regarding judicial arrangements in Anjengo and Changancheri in Madras, "the length of time that elapsed since the discussion had been pending" provided the justification.<sup>108</sup> The desirability of avoiding delay was another reason frequently advanced. In the case of Act XXI of 1835 concerning the new copper coinage, the argument that "considerable inconvenience is to be apprehended from any delay in coining the new copper" could hardly be convincing.<sup>109</sup> Again, in the case of the renewal of expiring laws, earlier action would have dispensed with the

<sup>105</sup> See the interesting account on the subject in C.D. Dharkar, *Lord Macaulay's Legislative Minutes* (Oxford, 1946), p. 26.

<sup>106</sup> Leg. Letter to Court, 2 May (No. 5) 1836, paras 10-16.

<sup>107</sup> Leg. Letter to Court, 10 October (No. 15) 1837. See also papers relating to Act X of 1837, Leg. Dep. Pros., 22 May 1837, Nos. 2-4; Act XXIII of 1839, Leg. Letter to Court, 30 September (No. 23) 1839; and Act XVIII of 1843, Leg. Letter to Court, 4 November (No. 19) 1843, paras 27-34.

<sup>108</sup> Leg. Letter to Court, 12 June (No. 8) 1837, paras 24-5.

<sup>109</sup> Leg. Dep. Pros., 7 December 1835, No. 19,

necessity of departing from the normal procedure.<sup>110</sup> There were also cases in which suspension of the orders was necessary to prevent speculation by merchants, to maintain law and order, etc. But, on the whole, during this period, the Council always seemed to ask itself the question, "Is it worthwhile consulting the public?" and not "Has a special situation or emergency arisen to necessitate a departure from the normal procedure?"

From 1838 onwards there was better appreciation of the spirit of the new procedure. Even so, replying to the Government of India's Legislative Letter of 24 August 1844, the Court of Directors observed that the special power had been invoked "in no less than nine instances since the beginning of 1842, and with two or three exceptions with no special or urgent reason, but merely for that of avoiding delay, which if admitted to be a valid reason would of course be applicable to the passing of every law and would entirely set aside the rules in question".<sup>111</sup> In 1845, despite this warning, the Council felt compelled to pass several Bills without promulgating the drafts and without allowing the usual time between the readings, because one of its members, Sir George Pollock, was proceeding to the Cape for reasons of health, and after his departure there would be no quorum left for legislative purposes.<sup>112</sup> The procedural rules in this respect were, however, better observed in subsequent years.<sup>113</sup>

<sup>110</sup> Papers relating to Act IV of 1836, Leg. Letter to Court, 2 May (No. 5) 1836, and Act VI of 1837. Leg. Letter to Court, 12 June (No. 8) 1837.

<sup>111</sup> Leg. Letter from Court, 19 March (No. 7) 1845.

<sup>112</sup> Leg. Dep. Pros., 27 December 1845, No. 3.

<sup>113</sup> The Court issued a warning similar to that of 1845 while reviewing Act II of 1847,—Leg. Letter from Court, 2 April (No. 7) 1848. In 1848, Lord Dalhousie disapproved of the action of the Council in dispensing with the usual interval allowed between readings in the case of the Bill for extending the jurisdiction of the Small Cause Court at Bombay. This step had been taken by the Council in view of the nearness of the date when C. H. Cameron, the incumbent Legislative Member, would retire, and the time his successor would naturally take to familiarise himself with the subject, thus delaying the progress of the measure. On receipt of the Governor General's sentiments, the Council ordered re-publication of the Bill, allowing the usual interval of three months. Leg. Dep. Pros., 6 May 1848, Nos. 36-7 & 40.

With regard to the various bodies to be consulted in enacting laws, as already stated, the Standing Orders did not lay down any rule; this was a matter left to be regulated in the light of experience. The Government of India maintained regular correspondence with the Local Governments and the Supreme Courts, and all proposals in which they were likely to be interested were referred to them for opinion. The privilege of direct correspondence accorded to the Supreme Courts was in recognition of their being Crown courts, independent of the Company's Governments in India.<sup>114</sup> The judges of the Supreme Courts exercised special influence on matters affecting their power and jurisdiction and on measures for the reform of English law as in force in India. This was so, both because of their standing and the fact that the authorities in England viewed with disfavour any collision between them and the Government of India. The Local Governments were expected to consult their senior officials, including the judges of the Sadr Courts, on draft Bills and transmit their views to the Government of India along with the Governments' own sentiments. Strict adherence to this convention was stressed in 1852 as Bombay was found remiss in its observance.<sup>115</sup> As regards non-officials, there could be, naturally, no such close consultation. Public interest in legislation was generally lacking, except when roused by specially unpopular Bills such as the *lex loci* measure. Mercantile bodies of Calcutta were particularly active in safeguarding their interests. Occasionally, when the circumstances of a case required, the Government of India consulted persons and interests primarily affected by a measure before finalising it.<sup>116</sup> It is also seen from the proceedings of the Council that both the official and non-official elements at Calcutta exerted greater influence over legislation than those at the subordinate

<sup>114</sup> Sir Erskine Perry, who had served as Chief Justice of the Supreme Court at Bombay, testified that the judges were invariably consulted in the matter of judicial reforms and their views received respectful attention. Parl. Papers, H. L. No. 20 of 1852-53, Q. 2527-8.

<sup>115</sup> Leg. Dep. Pros., 24 September 1852, No. 46.

<sup>116</sup> For instance, the Bengal Chamber of Commerce was consulted in preparing the draft of Act XXXII of 1836 regarding importation of sugar. Leg. Letter to Court, 28 December (No. 15) 1836.

Presidencies. On the whole the mechanism of consultation may be said to have proved flexible and worked satisfactorily.

### *Relations with the Local Governments*

Although the Local Governments were only one of the many entitled to be heard on the enactment of laws, they occupied a special position in the constitutional set-up. They were entrusted with the primary responsibility of carrying on the administration of the Provinces, and, until the enactment of the Charter Act of 1833, exercised the power to legislate as well. If the new system of centralised legislation was to be a success, it was of the highest importance that the Government of India should maintain close and healthy relations with them. This was distinctly recognised by Section 66 of the Charter Act of 1833. It required the Local Governments to submit for consideration by the Government of India such projects of legislation as they regarded necessary, together with their reasons for proposing the same, and the Government of India was in turn required to take the projects into consideration and communicate to the Local Governments the decisions reached upon them. Indeed, in respect of this provision, the Court of Directors expressed the fear that "at some future period, under the form of offering projects of laws, the subordinate Presidencies should be left to legislate for themselves, with as little aid from the wisdom of the Supreme Government as when the power of legislating was ostensibly in their own hands". The Directors warned the Government of India that this provision in no way absolved it from the obligation of so considering every provision of the law "as to make it really their own, the off-spring of their own minds, after obtaining an adequate knowledge of the case".<sup>117</sup> The Government of India, in its reply, showed a clear appreciation of the new and delicate role it was called upon to play : "We

<sup>117</sup> Public Letter from Court, 10 December (No. 44) 1834, para 33. Eric Stokes writes, "From the content and tenor of these instructions there is every reason to believe that James Mill was attempting to strengthen the Benthamite inspiration of the Charter Act after its attenuation by criticism in Parliament." *The English Utilitarians and India* (Oxford, 1959), p. 195.

will act upon the suggestions . . . never forgetting our own responsibility, for the words and form as well as for the spirit and principle of all our Acts, bearing at the same time in mind that laws mainly relating to local peculiarities especially require the information possessed only by local observers, and, in regard to such laws, should the draft of one not be originally prepared at the Presidency to which it relates, it will always be specially submitted for the observations of the Government of that Presidency before it is finally passed.”<sup>118</sup>

A study of the proceedings of the Council reveals a number of instances wherein the Government of India allowed the views of the Local Governments to prevail in respect of local matters, although it was not fully convinced by the arguments advanced. For instance, Act XIX of 1838 for the regulation and registration of coasting vessels in Bombay was passed in view of “the very decided opinion expressed by the Bombay Government”, although the Government of India was not convinced of the expediency of the pass system.<sup>119</sup> Act VIII of 1840 concerning the signing of awards by the members of *panchayats* in Madras was passed owing to the pressure of the Local Government and the Sadr Court, although the Government of India was reluctant “to legislate separately on matters not involving important and practical consequences, especially, as it was stated, if by appeal to the Privy Council or otherwise, there was a probability of the end being obtained without legislative interference”.<sup>120</sup> Act I of 1842 for better regulating the sale of opium and other intoxicating drugs within Calcutta was passed, although the Supreme Government was of the view that the measure could be deferred “until the arrival of the time for revising the system upon which the *Abkarry* revenue was managed”.<sup>121</sup> Again, a number of cases show how the persistence of the Local Governments overcame the opposition of the Government of India, even though the process involved considerable delay in their getting what they wanted. This is revealed, for instance, by the papers relating

<sup>118</sup> Leg. Letter to Court, 31 August (No. 3) 1835, para 18.

<sup>119</sup> Leg. Letter to Court, 19 November (No. 19) 1838, para 31.

<sup>120</sup> Leg. Letter to Court, 4 May (No. 13) 1840, para 18.

<sup>121</sup> Leg. Letter to Court, 1 July (No. 20) 1842, para 4.

to Act III of 1838 concerning the establishment of an Assistant Judge's Court at Cochin, having jurisdiction over Anjengo and Changancheri,<sup>122</sup> Act VIII of 1838 for the levy of tolls on palanquins and laden bullocks passing through the Bhore Ghat in the Bombay Presidency,<sup>123</sup> and Act XI of 1843 for regulating the service of the hereditary officers under the Government of Bombay.<sup>124</sup> Again, in the handling of every legislative project, the Government of India considered the question whether a proposal mooted in respect of one Local Government might not be made applicable to the others, and thus help in evolving a uniform system of laws. In doing so, however, it took good care that the views of the Governments who objected to such extension were not lightly disposed of. For instance, Act I of 1839, which was passed to relieve Munsiffs in Bengal of the duty of selling property distrained for arrears of rent, was not extended to Madras, but a separate measure, Act VII of 1839, was enacted for the Province as desired by the Local Government.<sup>125</sup> Act I of 1842 for better regulating the sale of opium and other intoxicating drugs within Calcutta was not extended to the other Presidency towns as the Local Governments concerned did not want it.<sup>126</sup> While passing Act XIV of 1851 consolidating the excise laws of the Straits Settlements, the Government of India refrained from introducing the Bengal system of licensing in view of the unanimity of local opinion against it.<sup>127</sup>

The Government of India did not find it possible to accept the views and recommendations of the Local Governments in a number of cases. In all such cases, the Local Governments were generally informed why their recommendations were not acceptable. To cite a couple of instances only, the Madras Government was told that its proposal to make sorcery

<sup>122</sup> Leg. Letters to Court, 2 January (No. 1) 1837, paras 47-9, 12 June (No. 8) 1837, paras 24-5, and 16 April (No. 7) 1838.

<sup>123</sup> Leg. Letter to Court, 4 June (No. 11) 1838, paras 27-9; and Leg. Dep. Pres., 14 August 1837, Nos. 6-8, and 18 December 1837, Nos. 4-6.

<sup>124</sup> Leg. Letter to Court, 4 November (No. 19) 1843, paras 9-12.

<sup>125</sup> Leg. Letter to Court, 20 May (No. 12) 1839, paras 88-94.

<sup>126</sup> Leg. Letter to Court, 1 July (No. 20) 1842, paras 5-6.

<sup>127</sup> Leg. Letter to Court, 31 March (No. 5) 1852, paras 4-13.



a penal offence could not be adopted, because such a measure would do more harm than good.<sup>128</sup> Another proposal from that Government was to penalise ornamenting of children. It was recommended because of the number of child murders reported, but it was rejected by the Government of India after making a detailed enquiry into the incidence of the crime and consulting the Law Commissioners.<sup>129</sup> The Government of India also found it difficult to entertain a proposal from Madras "for excluding from the jurisdiction of the Supreme Court all acts done by the Government as a Government and making such acts cognizable only by the superior authorities in England, and further to prohibit the Supreme Court from issuing any process in the interior having for its ulterior object the investigation of the official acts of public officers who are already amenable to the local tribunals". The Supreme Government fully sympathised with the Local Government's point of view. But, as the proposal affected the authority of a court of His Majesty, it had to proceed with the greatest caution. Moreover, in the particular case which had given rise to the proposal, it felt that the Supreme Court at Madras had not acted in any unreasonable spirit, while, on the other hand, the conduct of the Local Government had been lacking in wisdom.<sup>130</sup> Again, a measure proposed by the Government of Bombay for providing funds for the construction and maintenance of irrigation works in that Presidency did not find favour, because the proposed tax would affect all persons whether they benefited from the works or not and it would be a heavy and unjustifiable burden on rent-free lands.<sup>131</sup> Lastly, while enacting Act XXVI of 1850, the Government of India felt unable to accept the suggestion of the Governments of Bombay and Madras that rate payers should be associated with municipal administration in the mofussil areas without any reference to their wishes.<sup>132</sup>

<sup>128</sup> Leg. Dep. Pros., 14 August 1837, Nos. 13-15

<sup>129</sup> Leg. Dep. Pros., 14 August 1837, Nos. 29-31, and Leg. Letter to Court, 7 February (No. 4) 1838, para 49.

<sup>130</sup> Leg. Letter to Court, 20 March (No. 3) 1837, paras 54-60. Also, Leg. Dep. Pros., 23 January 1837, Nos. 102-9.

<sup>131</sup> Leg. Letter to Court, 22 December (No. 21) 1852, paras 70-7.

<sup>132</sup> Leg. Letter to Court, 6 December (No. 19) 1850, paras 49-60.

Apart from the recommendations of the Local Governments being not accepted in certain cases, there were occasional conflicts on other matters. One of the frequent charges, particularly against the Government of Bombay, was that there was gross delay in replying to correspondence and furnishing information asked for.<sup>133</sup> In one case, the Government of India held that the riots in Surat following the enhancement of the salt tax under Act XVI of 1844 would not have occurred if the Bombay Government had supplied all the information asked for in time and the town duties had been abolished at the same time as the enhanced duty was imposed.<sup>134</sup> There were also complaints that draft measures received from the Local Governments were indifferently drafted and sent without proper explanations.<sup>135</sup> Again, the Local Governments were at times warned against exceeding their powers. Strong objection was taken to the Bombay Government's proclamation of 1836 expounding the true meaning of Act XVII of 1835 concerning the new copper coinage. The Local Government was told that this was the province of the courts of law, and even the Supreme Government did not have the power.<sup>136</sup> In 1850, the Bombay Government was censured for levying tolls on the traffic passing through the Thall Ghat in anticipation of the enactment of the draft Bill on the subject, which was then under consideration by the Government of India.<sup>137</sup> To cite one other case, the Government of Madras protested to the Court of Directors against the enhancement of the price of salt in the province. The permission of the Directors to reduce the tax to Re. 1 per *garce* was received directly, and the change was notified by the Local Government without reference to the Government of India. Objecting to this action, the latter

<sup>133</sup> Leg. Letters to Court, 16 April (No. 7) 1838, paras 8-9, and 4 June (No. 11) 1838, paras 7-9.

<sup>134</sup> Leg. Letters to Court, 3 August (No. 15) 1844 and 21 September (No. 21) 1844, and Leg. Dep. Pros., 18 January 1845, No. 19.

<sup>135</sup> Leg. Dep. Pros., 12 December 1851, Nos. 38-40, and 17 September 1852, No. 10.

<sup>136</sup> Leg. Letter to Court, 4 June (No. 11) 1838, paras 42-4, and Leg. Letter from Court, 11 September (No. 14) 1839.

<sup>137</sup> Leg. Letter to Court, 13 June (No. 8) 1851, paras 38-9, and 10 December (No. 19) 1851, para 12.

pointed out that it was calculated "to weaken in the eyes of the people the respect which is due to the supreme authority in this country, and to detract in other instances from the force and validity of its legislative enactment".<sup>128</sup>

Instances can be multiplied to illustrate the occasions when the relations between the Government of India and the Local Governments were strained and also the occasions when the two evinced a spirit of cordiality and accommodation. On the whole, it would not be incorrect to say that the relations were smooth so far as the legislative front was concerned, and there was no pronounced dissatisfaction with the system of centralised legislation. W. Morrison, at the time of his retiring from the Governor General's Council in 1839, observed, "It has been the study of the Council of India since I have been connected with it, to apply its legislation to the wants of the other Presidencies, so as to prevent their feeling the absence of a local legislature as much as possible, and the acts that have been passed bear testimony that their interests have not been neglected; for there are as many local Acts for Madras and Bombay, as there are for Bengal." He added that the suggestions of the Local Governments had been negatived "only on grounds of principle and under a strong necessity for so doing".<sup>129</sup> Again, J. P. Willoughby, who was Secretary to the Government of Bombay for many years and retired in 1851 as a member of the Governor's Council, was on the whole satisfied with the working of the system of centralised legislation and favoured its continuance. According to him, consultations with the Local Governments were not "mere custom of courtesy"; they had often "induced the Government of India to modify proposed measures". Bombay drafts were not altered to such an extent "as to be a matter of complaint", although he had known of occasional cases in which the Local Government had thought that alterations had been introduced at Calcutta, which, when the law came into effect, partially defeated the object for which the law was applied for.<sup>140</sup> There was some criticism of the system also.

<sup>128</sup> Leg. Letter to Court, 21 September (No. 20) 1844.

<sup>129</sup> Minute dated 11 June 1839, Public Department, Original Consultation, 15 June 1839, No. 1, para 6.

<sup>140</sup> Parl. Papers, H. L. No. 20 II of 1852-53, Q. 3076 & 3218-21.

Sir Erskine Perry, who retired as Chief Justice of the Bombay Supreme Court, said that local subjects were disposed of by the Supreme Government on very inadequate grounds, and, in his own time, if the Local Governments had the power to legislate, there would have been greater progress in the field of law reform and education. However, in the example he cited, namely, the supersession of the Small Cause Court at Bombay against the wishes of the "Government, the Judges and the public", it is to be noted that the decision was that of the authorities in England and not that of the Government of India.<sup>141</sup> Again, John Sullivan, who was a member of the Madras Council, was a strong critic of the centralised system, but all the examples cited by him refer to matters relating to expenditure.<sup>142</sup> From the evidence tendered during the Charter discussions of 1852-53 against what was deemed to be excessive central control, it appears that the complaints had reference mostly to administrative and financial matters and not to legislative matters.<sup>143</sup>

In conclusion, it may be observed that the main problem confronting the body set up for purposes of legislation by the Charter Act of 1833 was that of executive-legislative relationship. A solution was sought to be found in not viewing the changes which were introduced as in any way establishing a legislative body separate from the executive government; the Governor General's Council was to be considered one and the same for both executive and legislative purposes, the Fourth Member being treated, in practice, as a member of the

<sup>141</sup> Parl. Papers, H. L. No. 20 of 1852-53, Q. 2764-73, and H. C. No. 426 of 1852-53. Q. 2602. Also, evidence of J. P. Willoughby, Parl. Papers, H. L. No. 20 II of 1852-53, Q. 3270-1.

<sup>142</sup> Parl. Papers, H.C. No. 556 of 1852-53, Q. 4662-3 & 4700.

<sup>143</sup> Lord Elphinstone, who had been Governor of Madras, observed, "I draw a distinction between legislative acts and administrative acts; I think that it may be proper to have one legislation for the whole of India and that that legislation should proceed from the Central Government; but I think the details of the administration had better be left to the subordinate Governments." Parl. Papers, H. C. No. 533 of 1852, Q. 2104 & 2196. W. Morrison observed that the Local Governments considered the control over public works more galling than in the legislative field. Public Department, Original Consultation, 15 June 1839, No. 1, para 8. See also Dr. Bisheshwar Prasad, *The Origins of Provincial Autonomy* (Allahabad, 1941), pp. 37-8.

Council for nearly all purposes. This solution was clearly not in consonance with the terms of the statute, and its implementation gave rise to a number of difficulties. The power of the Governor General to overrule his Council in legislative matters was another question that gave rise to doubts and difficulties. Subject to the stresses and strains imposed by these issues, the relations of the members of the Council among themselves were on the whole smooth. The procedural rules of the Council, simple and few as they were, worked fairly satisfactorily, and the consultative process was equally satisfactory and attained the limited objects the Government had in view. Relations with the Local Governments were cordial and there was no overt opposition to the system of centralised legislation.

#### *B. Period of the Charter Act of 1853*

##### *Legislative Council vis-a-vis the Executive Government*

While the day-to-day working of the Governor General's Council did not, on the whole, present any great difficulty in the field of legislation, it became increasingly clear that the Council as constituted in 1833 was much too small to meet the legislative needs of the great empire. A bigger body, representing the interests of the different Provinces, and with enough leisure to attend to legislative business, was a clear necessity. A new force, namely, public opinion, had also gathered strength, and was clamouring to be heard. As described in the last Chapter, the legislative machinery was overhauled by the Charter Act of 1853, and the first meeting of the reconstituted Council was held on 20 May 1854. The most important question that engaged the attention of this Council was, as in the case of the earlier body, executive-legislative relationship. The appointment of the Fourth Member as a full-fledged member of the executive government in 1854 did not put an end to the doubts and difficulties his original appointment had created. His place was now taken by six to eight members who were not entitled "to sit or vote in the said Council, except at meetings thereof for making

laws and regulations".<sup>144</sup> Under the new arrangements, the admission of these persons to participate in the deliberations of the executive government in any shape or form was wholly impracticable, and Bentinck's view that the Governor General's Council was one and the same for executive as well as legislative purposes, whatever its legal validity, was no longer of any practical significance. There were now two distinct and separate bodies: the Executive Council and the Legislative Council,<sup>145</sup> persons constituting the former being also members of the latter. The Charter Act of 1853 committed the same mistake as the earlier enactment: it failed to define the duties and powers, and regulate the mutual relations, of these two bodies. They were left to their own resources to find a workable solution.

There were two opposite trends of thought on the relations between the two Councils.<sup>146</sup> According to one of them, the true function of the Legislative Council was to make rules and regulations in the strict sense of the terms. It could claim no power, direct or indirect, over administrative and financial policies, including public expenditure, and it had no right to criticise or sit in judgment over the conduct of the executive. Its role under the constitutional system was only to fashion appropriate laws in the light of what the executive wanted. Acceptance of this view without qualification would have left real power, even in legislative matters, in the hands of the Executive Council and reduced the Legislative Council to a superior kind of legislative aid.

According to the other view, the law had conferred on the Legislative Council the power of making laws and regulations, and this power was not limited or circumscribed in any manner. It had no direct control over the administration or the executive

<sup>144</sup> 16 & 17 Vict., c. 95, s. 22.

<sup>145</sup> On the suggestion of Lord Dalhousie, the term "Legislative Council" was officially adopted to distinguish it from the Council of India meeting for executive purposes. Clause 1 of the Standing Orders and also Report of the Select Committee on the Standing Orders, Public Dep. Pros., 16 June 1854, No. 1.

<sup>146</sup> For the opposing views on the subject, see *Proceedings of the Legislative Council of India*, 1854-55, pp. 141-5. Also, *ibid.*, 1859, p. 210, and 1860, p. 1376.

government, but it had every right to scrutinise administrative and financial policies and suggest modifications in the course of discharging its legislative duties. It could pass any law it thought fit, not merely those which were wanted or approved by the executive. It could refuse to enact a general or taxation measure, if it was not satisfied about the soundness of the general administrative or financial policies of the Government. Further, by implication, it had all the powers proper and necessary for the discharge of its legislative duties. It could ask for information, call for production of papers, and examine witnesses, official and non-official. Indeed, as Macaulay pointed out twenty years earlier, the Legislative Council, under this view of the law, could exercise in India, as Parliament exercised in England, a control over almost all the proceedings of the executive government.<sup>147</sup>

<sup>147</sup> It is important to note that, at the very outset, there were basic differences as to the correct approach, between Lord Dalhousie and Sir Charles Wood. The latter wrote to Dalhousie on 23 December 1854, "I come now to an important matter, which is your letter as to the members of the Legislative Council; and I am afraid that you are inclined to place them in a position which I do not think and never intended that they should occupy: I never wished to raise up a great independent body in India. I look to the Governor General . . . I look upon all the Councils, Secretaries, etc., as so many machines for lightening the labour of the Governor General, and for doing what I may call the mechanical work of the Government. I have made him more absolute than he was in the Executive Council, and I do not wish to make the Legislative Council, a body which does more than aid him in law-making. The Executive Council is to aid him in administering, the Legislative Council in law-making. I admit of course that the latter must be more independent, but I do not wish to make it a body that is likely to take upon itself more weight or authority than is necessary for the purpose of elaborating laws: I do not look upon it, as some young Indians do, as the nucleus and beginning of a Constitutional Parliament in India." Lord Dalhousie was neither in agreement nor in sympathy with this approach. The independence of the Legislative Council, he contended, was not of his making, but of the statute. "The Governor General", he wrote, "cannot help himself. Except in the final veto after the passing of an Act, he has none of the overruling power over the Legislative which the law gives him over the Supreme Council." W. Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904), Vol. II, pp. 237-8. See also Wood's letter to Sir Bartle Frere, dated 18 February 1861. John

There was so little in common between these two views that a doctrinaire approach would have brought about a constitutional deadlock at the very outset. Fortunately, particularly during the first five years, the normal functioning of the Legislative Council was characterised by a spirit of amity and understanding among its members. Questions were considered on their merits, and members voted freely according to their best individual judgment. There was no "Treasury Bench" or opposition group. An analysis of the voting during the divisions of the Council shows that during these years the members of the executive government were more often on opposite sides than together. During the last two years, however, at the time when the relative powers of the Legislative and Executive Councils were being actively debated upon, a strong tendency for the members of the Executive Council to stick together is noticeable, but this is not likely to have been the result of any fixed policy as their views and votes clashed on quite a few occasions.<sup>148</sup> Similarly, there is no evidence of partisanship among the additional members of the Council either the judges or the "representative" members. That the Council worked on the whole in a normal healthy way is seen from the fact that the Council passed no law which the executive government considered embarrassing or failed to pass a law which it considered very necessary. The conduct of the Council, as will be explained later, was the subject of sharp criticism in many quarters; but this had reference to the Council's theoretical claims to power, and not so much to any unreasonable conduct on its part in respect of any particular

Martineau, *The Life and Correspondence of the Rt. Hon. Sir Bartle Frere* (London, 1895), Vol. I, p. 336.

<sup>148</sup> The following are the particulars regarding the divisions :

	1854-55	1856	1857	1858	1859	1860	1861
Total No. of Divisions	17	31	4	18	56	27	48
No. of Divisions in which the members of the Executive Council appeared on opposite sides	9	17	2	13	30	4	6



measure. This is not to say, however, that Government sponsored measures, were always accepted without any change of importance being made.<sup>149</sup> That would have really meant an abdication of its duty by the Legislature. What was necessary was an adjustment of the various points of view expressed during its deliberations; and it can be said that this was achieved except on rare occasions.<sup>150</sup>

On the question of the powers and privileges of the Legislative Council, during the first five years, there was no apparent conflict of interest between the members of the Executive Council and the additional members. All the members of the Legislature seemed to be equally keen on upholding its dignity, its powers and privileges. The Standing Orders of the body, modelled on the practice of the mother of Parliaments, were the work of Lord Dalhousie and the whole Council. The well-known resolution of 8 December 1855 questioning the competence of the Court of Directors to issue binding directions as to what laws should be enacted, was passed by the Council with Lord Dalhousie present and none dissenting.<sup>151</sup> When the Governor General's Absence Act of 1855 was on the anvil, it was J. P.

<sup>149</sup> For instance, the Trades and Professions Bill did not have easy passage (Proceedings of the Legislative Council of India, 1859, p. 548 *et seq.*, and 1860, p. 288 *et seq.*) and so also the Arms and Ammunitions Bill (*ibid.*, 1860, p. 287 *et seq.*). The Bombay Stamps Bill was severely criticised and withdrawn (*ibid.*, pp. 330-43).

<sup>150</sup> The Governor General had occasion to refuse his assent to only two measures. See p. 156 below. As regards the Legislative Council not passing a law which the Executive wanted, Sir J. P. Grant wrote on 14 October 1859, "I can say that in my experience, which includes a term of five years, from the first opening of the Council to the 1st of May last, no case of the kind occurred or seemed the least likely to occur." *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 30. See also W. Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904), Vol. II, pp. 239-44. The period subsequent to this observation of Grant was very disturbed, and there were frequent exhibitions of bad temper. But, on the whole, the Government got what it wanted. In the various minutes recorded by Lord Canning and other members of his Executive Council during 1859-61, there is no reference to any obstructionist attitude on the part of the Legislative Council in this respect. *Ibid.*, pp. 30-59.

<sup>151</sup> Proceedings of the Legislative Council of India, 1854-55, p. 839.

Grant, a member of the Executive Council, who insisted that the Legislature was not an assembly of the Governor General in Council and was "loath to adopt" any words which might mean an acceptance of this construction of the statute.<sup>152</sup> In this connection, the debate on "the Bill for taking of Evidence by the Legislative Council", sponsored by P. W. Le Geyt, the "representative" Member for Bombay, is also of great interest. The measure, if adopted, would have empowered any member or any Select Committee of the Council "to obtain the opinions of people affected by a particular law, to issue summonses and to compel the attendance of witnesses and the production of documents".<sup>153</sup> Sir Barnes Peacock, the Fourth Member, criticised the measure, pointing out *inter alia* the possibility of great conflicts arising between the Legislature on the one side and the administration and its officials on the other. On this occasion, it was again J. P. Grant who came out with a spirited defence of the Legislature. He urged that it was as responsible a body as the Executive Council, and it was wrong to assume that the powers proposed to be conferred on it by the Bill would be pushed to an absurd extent.<sup>154</sup> To cite yet another instance, in 1858, and again in 1859, the question was raised whether the Legislative Council had the power to correspond directly with the Local Governments, or it was necessary for communications to pass through the Government of India. On the former occasion, the three members of the Executive Council present, including Sir Barnes Peacock, held that the Legislative Council had the power.<sup>155</sup> On the latter occasion, Sir Barnes Peacock, going back on his earlier opinion, observed that "there were doubts entertained in high quarters as to the power of the Legislative Council to address the Local Governments directly," and expressed the fear that if the subject was litigated upon "it would be decided that

<sup>152</sup> *Ibid.*, p. 144.

<sup>153</sup> *Ibid.*, 1856, p. 534.

<sup>154</sup> *Ibid.*, pp. 581-93.

<sup>155</sup> *Ibid.*, 1858, pp. 747-52. Ricketts observed on this occasion, "It was objectionable to apply to the executive government, for by so doing the Council would acknowledge that they had not themselves the power to call for information."

this Council had not the power to call for information". But his fear was not shared by the other members, including J. P. Grant and H. Ricketts of the Executive Council.<sup>156</sup> On both the occasions, the power of addressing the Local Governments directly was exercised with the concurrence of most of the members of the Executive Council present. While the Executive Councillors thus took a leading part in upholding the rights and privileges of the Legislative Council, the latter body too, on its part, refrained from doing anything which gave the former cause for complaint.

The position, however, changed by the middle of 1859, directly arising out of the financial troubles of the post-Mutiny period. The financial system of the country required thorough overhauling,<sup>157</sup> and the British Government considered it necessary to depute James Wilson, "a gentleman who has had great experience in the business of the Departments of Finance and Trade in this country",<sup>158</sup> to set the house in order. In this situation, it is not surprising that many members of the Legislative Council were highly critical of the Government's policy, and the dangers inherent in the undefined executive-legislative relationship came to the surface. The lead in attacking the Government was taken by Sir Barnes Peacock, who had resigned the office of the Fourth Member and was now Chief Justice and Vice-President of the Council, and Sir C.R.M. Jackson, Puisne Judge. The members representing the Local Governments were divided in their loyalties. In its tone and approach, the Council often presented the appearance of having a "Treasury Bench" and a formal opposition. The conduct of the judges and the other members who joined them was severely criticised by Lord Canning, the members of his Executive Council and the authorities in England, and the Indian Councils Act of 1861 came to be popularly regarded as "an Act to abolish Sir Barnes

<sup>156</sup> Proceedings of the Legislative Council of India, 1859, pp. 208-10.

<sup>157</sup> For the sorry state of the Indian finances at the time as expounded by a member of the Government, see John Martineau, *The Life and Correspondence of Sir Bartle Frere* (London, 1895), Vol. I, pp. 298-302.

<sup>158</sup> Despatch from the Secretary of State for India in the Financial Department, 30 September (No. 96) 1859.

Peacock".<sup>159</sup> But an examination of the various incidents shows that the members of the Executive Council were perhaps more to blame than the others for the unhappy situation that developed.

Trouble started with the introduction of the Trades and Professions Bill by H. B. Harrington, who was a member of the Executive Council at this time. Speaking on the Bill, Sir Charles Jackson complained against the policy of asking the Legislative Council to pass taxation measures piecemeal, and made an issue of the members not being supplied with adequate information to enable them "to discharge their duties in an honest and efficient manner." He observed, "The Council were in fact legislating completely in the dark. Government ought to give them a full statement of their whole financial scheme, showing the amounts which had been raised under the new taxations, what the permanent deficiency was likely to be, and what measures Government intended to introduce to meet such deficiency." The statement supplied to them "displayed a perfect horror of details and a singular indulgence in round numbers".<sup>160</sup> Viewing this strongly worded request for information to be an attempt to gain control over the whole financial policy of the Government through threat of stopping supplies, Harrington came out with a highly provocative speech. Holding the demand to be *ultra vires*, he said, "Whatever Honourable Members might consider to be their duty to the public, when financial measures were proposed for their consideration, he could have no hesitation in telling them that it was the Governor General of India in Council in his executive capacity, and not the Governor General of India in his legislative capacity, who was responsible for the good government of India; who was answerable for the right administration of the public finances; and that this responsibility could neither be arrogated by this Legislature to itself, nor could this Council relieve the Governor General of India in Council in his executive capacity from it."<sup>161</sup> Now

<sup>159</sup> Sir George Campbell, *Memoirs of my Indian Career* (London, 1893), Vol. II, p. 99.

<sup>160</sup> Proceedings of the Legislative Council of India, 1859, pp. 633-4.

<sup>161</sup> *Ibid.*, p. 672. Also, pp. 670-82. The Government's view of the correct constitutional role of the Legislative Council in the matter was

that the question of the powers of the Legislature *vis-a-vis* the Executive was openly and squarely raised, the judges were not slow to take up the challenge. They asserted the right of the Council to demand full information in respect of every measure that came before it for consideration. They held that it was not there merely to register the will of the executive, that it had every right to accept or reject Government proposals in so far as they best served public interest or otherwise.<sup>162</sup>

best expressed by H. Forbes, Member for Madras : "It appeared to him that they might well accept the statement of the deficit made by the Government as a fact, and legislate upon it, without insisting upon knowing how that deficit had arisen, since that was a matter which could have no practical bearing on their deliberations, even if the information were supplied. He looked on the matter as he looked upon the Act for which the Governor General, from time to time, came down to this Council to enable him to proceed to the Provinces, and to act without his Council. He did not, on such occasions, demand to know what were the political reasons which induced the Governor General to quit Calcutta. He accepted as a fact that reasons did exist, and he was prepared to legislate accordingly." *Ibid.*, p. 695. A. Sconce, Member for Bengal, was not disposed to question the constitutional position as set out by Harrington, but he felt that the latter was expecting too much from the members if he wanted them to discuss and vote upon the measure without their being furnished "with the amplest information." *Ibid.*, p. 687.

<sup>162</sup> Sir William Jackson said that the responsibility for raising "such a discussion in that Chamber" was not his but that of Harrington, who represented the Government. He had only asked for adequate information and was indeed not disposed to question policies upheld by the Government on political grounds. But he could not put up with the attempt to stifle all criticism in the way it was done, which if it succeeded "would indeed render the existence of that Council a mere farce." *Ibid.*, pp. 685-6. Sir Barnes Peacock made a frontal attack, which was not uncalled for in the light of Harrington's speech. He rejected the doctrine that the Government's taxation measures should be adopted without question. He queried, "Was it to be supposed that this Council was bound to pass every crude Act that Government might think fit to bring before it, and an Act which the Mover himself had admitted was founded on no principle? Were they to act independently in the exercise of the important functions vested in them, or were they to become mere registrars of the decrees of Government? Were they not to be allowed to express an opinion or to make any enquiry or suggestion on a matter which came before them, without being told that they were arrogating to themselves a power which did not belong to them?" In conclusion, "He, for one, must say that, so long as he had the honour of a seat in the Council, he

With the coming of James Wilson the situation eased considerably. His budget speech and the frank and open manner in which he presented the difficulties of the Government had the effect of cooling tempers and assuaging ruffled feelings.<sup>163</sup> The highly controversial Income Tax Act, whatever the other storms it had to weather, had a fairly smooth passage through the Council.<sup>164</sup> After the death of Wilson on 11 August 1860, another serious clash developed over the grant of £34,000 a year to the descendants of Tipu Sultan by the Secretary of State for India. The decision had been taken without consulting the Government of India, and the information somehow leaked out before the Government was prepared to make the matter public. Coming at a time when there was a serious deficit and all-out efforts were being made to meet it, the news created quite a commotion. Sir Barnes Peacock moved a

should claim the right to exercise within those walls a free and independent judgment, and to abstain from giving any vote except after mature deliberation and according to the dictates of his own conscience." *Ibid.*, pp. 704-5.

<sup>163</sup> Referring to the attitude of Wilson, Sir Charles Jackson observed, "He [Wilson] was a statesman accustomed to deal with men, and knew how to earn their confidence, and he promised the Council full publicity, and gave us all he promised." Proceedings of the Legislative Council of India, 1860, p. 1365. Also, see *ibid.*, pp. 1347, 1350 & 1367-9. Wilson's success in the matter is also seen from the following extract of a letter from Sir Bartle Frere to Sir George Clerk, former Governor of Bombay, dated 9 May 1860: "Everybody has lost confidence in Government and in every one else, and Mr. Wilson's plain statement of his difficulties, and the plan he proposed for getting out of them, were the first gleam of light that the non-official public had seen for many a day. There was a visible return of confidence; and all was going on well, till Sir C. Trevelyan's Minute appeared, and this gave to those who disliked the new taxes—always, of course, a numerous body—just the sort of encouragement they wanted."—John Martineau, *The Life and Correspondence of the Rt. Hon. Sir Bartle Frere* (London, 1895), Vol. I, p. 308.

<sup>164</sup> See in particular the speeches of Wilson and Peacock. Proceedings of the Legislative Council of India, 1860, pp. 901-4. On this occasion, Sir Mordaunt Wells, Puisne Judge, observed, "At the same time, he did not shrink from stating that having confidence in the Executive Government of India, he should not, under any circumstances feel justified in offering a *substantial* opposition to the principle of the financial measure submitted to this Council by the Executive Government." *Ibid.*, p. 641.

resolution asking for information and papers on the subject, and he was supported by Sir Charles Jackson and two of the "representative" members, C. J. Erskine from Bombay and A. Sconce from Bengal. The motion was opposed by H. B. E. Frere and C. Beadon, members of the Executive Council, and they had the support of H. B. Harrington from the North-West Provinces and H. Forbes from Madras. They took the stand that, even if the allegation was true, the action was that of the Secretary of State for India over whom the authorities in India had no control; that the subject matter of the motion had no relation to any legislative project before the Council; that it was essentially a matter which came within the sphere of the Executive Council; and that the motion, if carried, would be in effect a vote of no-confidence in the executive, which was beyond the powers of the Council to adopt. Those who favoured the motion argued that the subject was closely connected with the taxation Bills even then pending before the Legislative Council. Although they had no power to control the action of the Secretary of State for India, they had every right, and it was their duty, to draw the attention of Parliament and the public to the allegedly questionable proceedings. The motion was carried by the casting vote of Sir Barnes Peacock who was presiding.<sup>165</sup>

The debate was a needless exhibition of deep-seated differences within the Government circles—"the spectacle of another Indian Mutiny more unaccountable than any that had preceded it," as Sir Bartle Frere characterised it.<sup>166</sup> While the judges

<sup>165</sup> *Ibid.*, 1860, pp. 1343-1400. Referring to this incident, Hon. S. Laing, who became a member of the Executive Council a few months later, observed in his minute dated 28 January 1861, "Upon this issue the Government has been beaten in their own Legislative Council by a majority headed by their own Chief Justice, and, as far as I can judge, supported by the unanimous opinion of all classes, European as well as native, official as well as non-official, in all the Presidencies and throughout the length and breadth of India." He also commended the conciliatory spirit shown by the Government later on. *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 57. See also *The Calcutta Review*, Vol. XXXVI, January-June 1861, pp. 166-7.

<sup>166</sup> Proceedings of the Legislative Council of India, 1860, p. 1361.

might perhaps have shown greater patience in handling the situation, the responsibility for precipitating the incident appears to be more that of the members of the Executive Council. The information sought, as admitted by Beadon, was within the knowledge of everybody and was *Bazar* gossip; it was not being supplied officially on principle.<sup>167</sup> Prior to the motion being introduced, the Government had been approached informally, and it had taken the stand that "neither this Council nor any of its members ought to ask for such information, as they had no power to interfere in the matter."<sup>168</sup> During the course of the debate, when it was pleaded that since the proceedings of the Council were held in public, it was difficult for the Government to place secret and confidential information before it, Sir Barnes Peacock pointed out that it was open to the Government members to move for a secret session,<sup>169</sup> and offered to withdraw his motion if he was supplied with a copy of the papers asked for, which he would treat as confidential.<sup>170</sup> After all this bitter fight, when the Government was faced with the resolution of the Council, it did not refuse to supply the information. Some of the accounts asked for were supplied. As regards that portion of the resolution which related to the correspondence with the Secretary of State for India, it was pleaded that the discussion was still proceeding, and as such it was not in public interest to release the correspondence, and that the request of the Council would be communicated to the Secretary of State. As an anti-climax to the incident, on receipt of this message from the Government, Sir Charles Jackson thanked the Government for conceding "all the information which it was able to give."<sup>171</sup> Could not the incident have been avoided if the Government had shown greater tact and spirit of accommodation?<sup>172</sup>

<sup>167</sup> *Ibid.*, p. 1377.

<sup>168</sup> *Ibid.* p. 1344.

<sup>169</sup> *Ibid.*, p. 1393.

<sup>170</sup> *Ibid.*, p. 1378.

<sup>171</sup> *Ibid.*, p. 402. Also the remarks of Sir Barnes Peacock during the debate on the prison at the Nilgiris. *Ibid.*, 1861, pp. 154-5.

<sup>172</sup> Lord Canning was at that time in the Upper Provinces and Sir Bartle Frere was the acting President of the Council. The action of Frere, however, was endorsed both by Lord Canning and Sir Charles Wood. John Martineau, *The Life and Correspondence of the Rt. Hon. Sir Bartle Frere* (London, 1895), Vol. I, p. 333-4.



The episode strengthened the determination of the authorities in England to curtail the authority of the Legislative Council of India by an amendment of the statute. While the matter was being matured in England, in March 1861, there was another clash over supply of information about progress in the construction of a prison for Europeans at the Nilgiris. At the time Act XXIV of 1855 substituting penal servitude for transportation was passed, the Government had undertaken to provide adequate prison facilities for European convicts. Sir Charles Jackson, Puisne Judge, alleged that when he visited the Nilgiris he found that no satisfactory progress had been made in the construction of the prison. He demanded information on the subject, since he wanted the Council to consider what remedial legislation should be undertaken. A similar request on the same subject had, indeed, been conceded in 1859.<sup>173</sup> On the present occasion, however, the Government resisted the demand on the ground that the question had no relation to any legislative measure then pending before the Council and it was entirely a matter for the executive government at that stage. It also urged that since the authorities in England were seized of the constitutional issue involved in the case, it was desirable in public interest to avoid a controversy on the subject in India. They even offered to supply the information informally to any member who wanted it in his personal capacity.<sup>174</sup> But, this

<sup>173</sup> Proceedings of the Legislative Council of India, 1859, pp. 286-8.

<sup>174</sup> The Government's policy concerning supply of information to the Council was at this time very conservative. In recommending a change in policy, Sir Bartle Frere observed under the scheme he put forward, "They [the Legislative Council] would form the ordinary medium of communication between the Executive Government and the public, and for this purpose all papers relating to the revenue, the police, the judicial administration, education, municipal questions, public works and generally all matters except diplomatic arrangements with foreign states, and such as relate to the army and finance, should, as a rule, be laid before the Legislative Council, and made accessible to the public, as the Council might order. The reservation by the Executive Government of any papers in such Departments should be made the exception, not the rule as at present." *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 47.

time, the opposition was in no mood for compromise: the Council as such was entitled to have the information and it would have it. The motion was pressed to a division and was passed, only the three members of the Executive Council present voting against it. The Government did not reject the demand, but supplied the information promptly at the next meeting of the Council.<sup>175</sup> Again, would not the Government have done well to avoid the incident by a timely and graceful, although temporary, concession?

To sum up the relations between the Executive Council and the Legislature during the period, there was an obvious lacuna in the statute. Right from the start, beginning with Lord Dalhousie and Sir Charles Wood, there were differences as to the real meaning of the statute. But the system that had been set up could work with reasonable men under normal circumstances. Indeed, it did work in a fairly satisfactory manner under Dalhousie, though not to the satisfaction of Wood. Even the great crisis of the Mutiny was met without any cracks appearing on the legislative front.<sup>176</sup> When the situation eased a bit and men were free to talk, and when there were so many unpopular measures on the legislative anvil, the Government could hardly expect to escape criticism. But the Legislative Council was not composed of tub-thumping orators. Its members had no electorate to please or humour. It had as its members administrators of the highest eminence

<sup>175</sup> Proceedings of the Legislative Council of India, 1861, pp. 143-69.

<sup>176</sup> Lord Dalhousie's satisfaction with the working of the Council is clearly reflected in J. G. A. Baird, *Private Letters of the Marquess of Dalhousie* (1911), pp. 311 & 348. It is significant that, prior to the Mysore Grant debate, Lord Canning recommended the inclusion of the Chief Justice as a member of the Legislative Council in his reform proposals. In his later recommendations, however, he wanted the omission of the judges altogether. Lord Canning's letters to the Secretary of State for India, dated 9 December 1859 and 15 January 1861, *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), pp. 37 & 40. Again, although Sir Charles Wood was critical of Dalhousie's policy, in writing to Sir Bartle Frere on 18 February 1861, he admitted that as long as Dalhousie was in India, he "generally presided, and kept things straight." John Martineau, *Life and Correspondence of Sir Bartle Frere* (London, 1895), Vol. I, p. 336.

in the service of the Company or His Majesty. Their speeches in the Council were not more intemperate than the minutes recorded by the members of the Council prior to 1853. If the Government felt on any occasion that open debate was prejudicial to public interest, it could have invoked the provision for holding secret sessions. In none of the incidents discussed above there was any overwhelming necessity to raise constitutional issues. In going through the debates of the Council and other papers, one gets the feeling that it was less a clash of principles than of personalities. While the judges might have given a lead in the matter of tact and discretion, it must be said that Lord Canning's leadership on the legislative front was wholly lacking in imagination.

*Personnel Matters relating to the Members of the Council*

The Charter Act of 1853 had not laid down the tenure of the additional members or the salary they were to be paid. The Court of Directors instructed that the Legislative Councillors appointed by the Provincial Governments should hold their office for a term of five years just like the Executive Councillors, and they should be deemed to have vacated office if they were absent for longer than six months. They were to be paid Rs. 50,000 per annum, the highest rate of salary permitted to any person holding a rank below that of a member of the Executive Council. As regards the two posts to be filled by the Governor General, the Court of Directors observed that the Council was sufficiently numerous without these additional members. These posts were to be filled only when inconvenience was experienced by the temporary absence of one or more of its ordinary members or, when, in respect of any particular measure, it was considered desirable to secure the assistance of a person who had special knowledge or local experience of the subject under consideration.<sup>177</sup> Appointments to these posts were, however, not made at any time. As regards the office of the Vice-President of the Council, it was a position of great

<sup>177</sup> Public Letter to Court, 17 October (No. 87) 1854, and Leg. Letters from Court, 26 July (No. 20) 1854 and 21 February (No. 3) 1855.

importance, because the Vice-President generally presided over the deliberations of the Council. The first to hold the office was Sir Lawrence Peel, Chief Justice of the Supreme Court at Calcutta. He was succeeded by J. A. Dorin, the senior-most Executive Councillor, at the close of 1855. On his retirement, Dorin was followed by the Chief Justices Sir J. W. Colville and Sir Barnes Peacock in 1858 and 1859 respectively.

*“Representative” Members and the Local Governments*

The members of the Legislative Council, it has been stated earlier, represented in general no class or interest, and they were free to act according to their best individual judgment in the common service of the Company and Her Majesty. The position of the members appointed by the Local Governments was, however, involved in doubt. The Act of 1853 did not enjoin that they should act under the orders of their respective Governments. The Standing Orders of the Council also clearly pointed towards their being not considered as delegates. The obligation to sponsor projects of laws submitted by the Local Governments, or to make such other motions as might be considered necessary, was laid on the nominees of the respective Governments only in case no other member of the Council came forward to do so. The Select Committee on Standing Orders, however, expressed the view that it would be convenient all-round if the Local Governments utilised the services of their “representative” members to sponsor measures required by them.<sup>178</sup> These members generally “confined themselves to the introduction of measures connected with the administration of their respective Governments”, although in various instances they undertook to sponsor measures unconnected with them.<sup>179</sup> Their relations with their Governments were close and intimate. In their communications to the latter, they gave expression to their views freely, both on the contents of the measures under consideration and on the reception they were likely to have in

<sup>178</sup> See p. 153 below.

<sup>179</sup> Message from the Legislative Council on the practical working of the Standing Rules and Orders, para 10, Pub. Dep. Pros., 21 October 1859, No. 32.

the Council.<sup>180</sup> While introducing measures it was usual for them to place on the table of the Council the correspondence with their Governments, and this ensured that the Council was fully acquainted with their views and sentiments. Under normal circumstances, each of the Local Governments had an effective spokesman of its views in the Council.<sup>181</sup> The "representative" members were, however, under no obligation to support the views of their Governments; they were free to speak and vote according to the dictates of their conscience.<sup>182</sup> While this was the correct constitutional position, there was bound to be dissatisfaction when a Local Government witnessed its member opposing its proposals, and there was none under an obligation to defend and press home its views during the debates of the Council. There was, however, only one prominent instance when this dissatisfaction came to the surface. It was in connection with James Wilson's Income Tax Bill and Licensing of Arts, Trades and Professions Bill to which the Madras Government was vehemently opposed. Referring to the latter's directive to its member, H. Forbes, to communicate its views to the Council and to "advocate and illustrate them" to the utmost

<sup>180</sup> See, for instance, Papers of Acts XXV of 1855, II of 1856 and XII of 1859.

<sup>181</sup> J. P. Grant's minute, dated 14 October 1859, para 7, *A Selection of Papers relating to the Constitution and Functions of the Legislative Councils* (Calcutta, 1886), p. 31.

<sup>182</sup> Explaining his position in respect of the Arms and Ammunition Bill, Harrington, Member for the North-Western Provinces, observed, "He did not understand he was in that Council to represent the individual views of the Lieutenant Governor of the North-Western Provinces, or to advocate those views when they were opposed to his own. No doubt he received his appointment from the Government of the North-Western Provinces, but from the time that appointment was made, he became a member of the Council of the Governor General of India for the purpose of making laws, not for the North-Western Provinces alone, but for all India; and his duty was to consider the interest of all India, not particularly any part of it, though the quarter which he represented must be considered to have special claims upon him, which he hoped he should always be found ready to acknowledge." Proceedings of the Legislative Council of India, 1860, p. 796. See also Papers of Act XXV of 1855 wherein D. Elliott, while conveying the views of his Government, did not shrink from maintaining his own standpoint in the Council.

of his power,<sup>183</sup> Sir Charles Wood observed in Parliament, "The Madras Member of the Legislative Council is not a mere delegate, and, of course, is free to exercise his own discretion, as to the course which he thinks best calculated to promote the interests of India."<sup>184</sup>

*The Governor General's Relations with  
the Legislative Council*

In our study of the relations of the members of the Council *inter se*, we come lastly to the role of the Governor General. Lord Dalhousie took keen interest in the work of the Legislative Council and attended almost every one of its meetings except when he was on tour. His successor Lord Canning, however, during the six years of his tenure, attended only a couple of meetings in the beginning, and two meetings in March 1859 in connection with the Customs Duties Bill. He appears to have occupied a position above and remote from the Council, and the relations between the two assumed a formal character.

As regards his special powers in legislative matters, it should be noted that the Governor General had no right of absolute interference in the work of the Council. His authority was strictly confined to an expression of assent or dissent to laws duly passed by the Council. The power to dissent was intended to be exercised only on exceptional occasions, and it was invoked only twice during the period. The first time, it was in connection with the Bill to make better provision for the order and good government of the suburbs of Calcutta and Howrah. While withholding his assent, Lord Canning pointed

<sup>183</sup> Letter addressed to H. Forbes, dated 26 March 1860, Parl. Papers, H. C. No. 339 of 1860, p. 129. Sir Bartle Frere, who was a member of the Governor General's Executive Council at the time, felt that the Government of India should have taken the Local Governments more into their confidence on the Income Tax Bill as well as in other matters. John Martineau, *Life and Correspondence of Sir Bartle Frere* (London, 1895), Vol. I, p. 311.

<sup>184</sup> Hansard (III Series), Vol. CLVIII, 1860, pp. 1141-2.

out that a material amendment affecting the religious practices of the Hindu community had been made during the third reading. He felt that the Bill should have been republished for general information as required under the Standing Orders and an opportunity given to the public to express their sentiments before it was finally passed. The measure was re-introduced and, after it passed through the usual stages, enacted as Act XXI of 1857 with some minor changes in the provision to which objection had been taken.<sup>185</sup> The Court of Directors approved the action of the Governor General with the remark that the Council should be "most wary how they interfere in things concerning the religion and customs of the natives".<sup>186</sup> The Flogging Bill of 1861 was the next measure to which Lord Canning declined to give his assent. Since the days of Bentinck corporal punishment had been a highly controversial subject. In justification of his action, Canning observed, "He had no doubt on the point of principle, but there were serious defects in the details of the measure. The definition as to age was very vague and not sufficient as a guide to the courts. There appeared to be too much detail, and that not of a very judicious character, as to the mode of inflicting the punishment. Security was wanting for a safe and judicious medical supervision, and there was an absence of a provision, so desirable in all such cases, for the exercise, at any rate to some extent, of the discretion of the Local Government."<sup>187</sup> It appears, in this case, the occasion to dissent from the Bill might not have arisen if Canning had been more closely associated with the work of the Council.

<sup>185</sup> Lord Canning's letter to Currie, dated 12 March 1857, Papers of Act XXI of 1857. Also, Proceedings of the Legislative Council of India, 1857, pp. 167-8.

<sup>186</sup> Leg. Letter from Court, 29 July (No. 3) 1857.

<sup>187</sup> These remarks were made in 1862 by Lord Canning while addressing the reconstituted Council on the Whipping Bill. His reasons for dissent were not stated earlier, because the Legislative Council constituted under the Charter Act of 1853 had been dissolved. Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations, 1862, p. 25.

*Revised Legislative Procedure*

We have so far considered the role of the different sections of the Legislative Council and their inter-relationship. We shall now pass on to study the changes in legislative procedure and the manner of its working. To assist the Council in its early deliberations, Lord Dalhousie prepared a minute indicating the main principles upon which its Standing Orders were to be based.<sup>188</sup> A committee of the Council, which included Sir Barnes Peacock, Fourth Member, and Sir Lawrence Peel, Chief Justice, drew up the orders incorporating most of His Lordship's suggestions,<sup>189</sup> and these were adopted by the Council.<sup>190</sup> The basic objectives that Macaulay had in view in 1835 continued to hold good: adequate safeguards to ensure due deliberation; the minority in the Council, however small, to be ensured a fair hearing; the public to be given reasonable opportunities to communicate their views and sentiments; and the Government to have reserve powers to ensure speedy legislation in an emergency. To these was now added a new principle, that the proceedings of the Council should be generally open to the public and the press.<sup>191</sup> While the objectives in framing the Standing Orders were the same as before except for this addition, the few simple rules that guided the proceedings of the old Council were considered totally inadequate to meet the needs of the new Council. More detailed rules were no doubt necessary, but those adopted were unnecessarily rigid and elaborate.

As regards introduction of Bills, whether the initiative came from the public by way of petitions or from the Local Governments and the Government of India, they had to be sponsored by one or the other of the members. There was no difficulty

<sup>188</sup> Proceedings of the Legislative Council of India, 1854-55, pp. 1-10.

<sup>189</sup> *Ibid.*, pp. 1-10.

<sup>190</sup> Report of the Select Committee on the Standing Orders, 10 June 1854, Public Dep. Pros., 16 June 1854, No. 1. Standing Orders adopted on 19 August 1854, Proceedings of the Legislative Council of India, 1854-55, pp. 10-33.

<sup>191</sup> The decision on this point was taken only in April 1855, but it appears that the Council had this point clearly in view in drafting the first set of the Standing Orders.



about measures required by the Central Government, because the members of the Executive Government were members of the Legislature as well. The Local Governments too had their "representative" members. But it was considered improper to *direct* the Local Governments to transmit their projects of laws to the latter for being sponsored, although this mode of procedure was regarded "most convenient to the Local Government and to the Legislative Council, and also most conducive to the despatch of business".<sup>192</sup> Since the Council was under a statutory obligation to take into consideration every draft measure submitted to it by a Local Government,<sup>193</sup> it was provided that the Clerk of the Council should report its receipt. If no member made any motion upon the subject within four weeks, it was incumbent upon the "representative" member of the Government concerned to sponsor it or make such other motion as he thought fit.<sup>194</sup> As regards measures relating to the public finances, the constitution of the army or the navy, and the dealings of the British Government with Foreign States, Lord Dalhousie recommended that they should be entertained from outside only when transmitted to it by the Executive Council.<sup>195</sup> The committee of the Council that framed the Standing Orders was in entire agreement with this view. It was of the opinion that, if any project was received directly from the Local Governments, it should, as a general rule, be submitted in the first instance for the consideration of the Executive Council. It was, however, not prepared to lay down a rule to this effect, since that would have been at variance with Section 66 of the Charter Act of 1833. It felt that an executive directive from the Government of India addressed to the Local Governments would serve the purpose equally well.<sup>196</sup>

As regards the stages through which a Bill had to pass before it was duly adopted by the Council, the Standing Orders made provision for three readings, examination and report by

<sup>192</sup> Report of the Select Committee on the Standing Orders, 10 June 1854, Pub. Dep. Pros., 16 June 1854, No. 1.

<sup>193</sup> 3 & 4 Wm. IV, c. 85, s. 66.

<sup>194</sup> Standing Order No. 31.

<sup>195</sup> Proceedings of the Legislative Council of India, 1854-55, p. 5.

<sup>196</sup> Pub. Dep. Pros., 16 June 1854, No. 1.

a Select Committee, and detailed consideration and adoption of each of the clauses by the whole Council sitting as a Committee. Sufficient notice was to be given at every stage to ensure that the members came fully prepared. The consideration of a Bill by the Council was to be mainly through oral discussion. Hitherto, the practice was for the members to record preliminary minutes on every project that came up. There was very little discussion at the meetings of the Council and decisions were reached mostly on the basis of the minutes. This procedure, it was felt, afforded no opportunity for real exchange of ideas, and it had come to be generally regarded as cumbersome, involving considerable waste of time.<sup>197</sup> The recording of preliminary minutes was, therefore, to stop. Instead, the mover of a Bill was to prepare a statement of objects and reasons, which he was to submit at the time of the first reading, together with a draft of the Bill and the connected papers. Further consideration of the measure was to be through oral discussion. Another important innovation, in the words of Sir J. P. Grant, was "the employment of a small committee, selected for their peculiar fitness with reference to the particular matter in hand, to do what may be called the hard desk-work of legislation, instead of imposing the whole of that burthen upon the shoulders of a single man, as formerly".<sup>198</sup> There was a move to invest the committee with power to summon witnesses and call for papers, and also to proceed to different parts of the country to make enquiries. A Select Committee was appointed in 1856 to report on the subject, but no further progress was made, presumably because it touched the delicate ground of executive-legislative relationship.<sup>199</sup> Finally, adequate provision was made to ensure that the minority in respect of any Bill received a fair hearing.

<sup>197</sup> Evidence of David Hill (Parl. Papers, H. C. No. 426 of 1852-53, Q. 1456) and Frederick Millett (*ibid.*, Q. 1490-6). See also the views of J. P. Grant and Sir Barnes Peacock, *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), pp. 31 & 33.

<sup>198</sup> Letter to the Governor General in Council, 14 October 1859, *ibid.*, p. 31.

<sup>199</sup> Debate on Evidence (Legislative Council) Bill, Proceedings of the

In the last resort, a member could force a division in respect of the whole or part of a Bill with a view to place on record his dissent, and he could also deliver a minute explanatory to his assent or dissent.<sup>200</sup> These minutes in respect of controversial measures were necessary to acquaint the Court of Directors with the arguments advanced by the various members so that it could exercise its power of review better.

The provisions with regard to publication of Bills under the consideration of the Council were in substance the same as before. The time allowed to the members of the public to present their views was eight weeks in respect of measures concerning the Presidency of Bengal and twelve weeks in respect of the other Presidencies.<sup>201</sup> Presumably because of the difficulties in the way, it was not considered advisable to make translation into and publication in Indian languages obligatory in respect of every Bill that passed the first reading. This question was left to be determined by executive orders.<sup>202</sup> There were clear rules for the reception and disposal of petitions. To avoid encroaching on the sphere of the executive government, it was expressly laid down that petitions "must relate to matters connected with the business of the Council".<sup>203</sup> In the case of a Bill "peculiarly affecting private interests", provision was made to allow a petitioner to be heard at the bar of the Select Committee on the Bill or of the Committee of the whole Council, either by himself or through his counsel.<sup>204</sup>

A proposal to publish the legislative proceedings of the Government of India had been mooted in 1835, but it had not been accepted. This and the question of throwing open the meetings of the Council to the public were prominently raised in Parliament when the Charter Bill of 1853 was under con-

Legislative Council of India, 1856, pp. 532-4 & 581-95. Also, petition from the British Indian Association, 22 September 1859, praying that these powers should be conceded, Pub. Dep. Pros., 21 October 1859, No. 35.

<sup>200</sup> Standing Orders, Nos. 55 and 89-93.

<sup>201</sup> *Ibid.*, No. 69.

<sup>202</sup> Report of the Select Committee on the Standing Orders, 10 June 1854, Pub. Dep. Pros., 16 June 1854, No. 1.

<sup>203</sup> Standing Orders, No. 22.

<sup>204</sup> *Ibid.*, No. 29.

sideration. No objections were raised at that time to the principles involved by any of the Government's spokesmen. Sir Charles Wood only pleaded that these were matters of detail to be settled in India.<sup>205</sup> These grave and important issues were thus lightly disposed of and no positive directions as to the course of policy to be adopted were issued to the Government of India. The reaction to the proposals was generally favourable in India. The Council took up the subject for consideration on a petition from the British Indian Association of Calcutta.<sup>206</sup> On December 1854, with all the members present excepting the Commander in Chief, it reached a unanimous decision that the public may be admitted to witness the proceedings as a normal rule, provision being made for excluding the public whenever necessary. On the same occasion a proposal for the admission of press reporters was rejected by 4 votes to 7. But provision was made for an official reporter, and copies of his reports were to be furnished to the daily newspapers.<sup>207</sup> The subject of press-reporting came up again for consideration in 1856 on a request by a Calcutta paper and on the motion of Sir Barnes Peacock, the Fourth Member, it was decided unanimously to permit it.<sup>208</sup> In view of later criticisms, it is important to note that these momentous decisions were taken without any voice being raised against them in the Council. Sir Charles Wood was distinctly unhappy at the development. He disclaimed that he "ever dreamt of a debating body with open doors and even quasi-independence".<sup>209</sup> But he had not warned the Government of India earlier, and

<sup>205</sup> Hansard (III Series), Vol. CXXVIII, p. 382.

<sup>206</sup> J. P. Grant who made the motion stated that he did it with the full approval of Lord Dalhousie. *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 31.

<sup>207</sup> Proceedings of the Legislative Council of India, 1854-55, pp. 88 & 102. Also, Report of the Standing Orders Select Committee concerning the admission of strangers, 25 November 1854, Pub. Dep. Pros., 15 December 1854, No. 8.

<sup>208</sup> Proceedings of the Legislative Council of India, 1856, pp. 279 & 318.

<sup>209</sup> Letter to Sir Bartle Frere, 18 February 1861, J. Martincau, *The Life of Sir Bartle Frere* (London, 1895), Vol. I, p. 336. Also, see p. 135 above.

he did not also disapprove of the Standing Orders when they were adopted.

Finally, provision was made as before for suspending any or all the Standing Orders to meet special situations and emergencies. "Such suspension", it was laid down, "ought to be rarely had recourse to, and never without cogent reasons given to the satisfaction of the Council."<sup>210</sup>

Coming to the practical working of these Standing Orders, in a message to the Secretary of State for India, dated 6 September 1859, the Legislative Council observed, "In the judgment of this Council, speaking generally, those orders have fully attained the object for which they were framed: they have provided a procedure simple and unembarrassed by unnecessary forms, and have on no occasion been found to offer impediments to legislation or to cause any delay beyond what was necessary for the purpose of affording the public a full opportunity for discussion."<sup>211</sup> This opinion was too partial and one-sided, if it meant that the orders worked wholly in the manner expected or gave universal satisfaction.

The most glaring defect of the rules, taken as a whole, was that the forms and procedure of Parliament were followed in a much more detailed and meticulous manner than was necessary or desirable. We see in them, and in the actual way the Council worked, a good bit of the outward show and formalism attached to the proceedings of Parliament. We seem to miss only the clang of the division bell, votes being recorded by the Clerk calling out the names of the members and recording their votes while at their seats. This fact, together with the presence of the Judges of His Majesty's Court and the free and independent manner in which the Council worked, gave the body the appearance of being an "Indian Parliament"—a "Little Parliament" as it was called in derision. The critics of the Council observed that this gave the public a false view and a false hope, and much more was expected of the body than was warranted.<sup>212</sup>

<sup>210</sup> Standing Orders, No. 125.

<sup>211</sup> Pub. Dep. Pros., 21 October 1859, No. 32. Also, Proceedings of the Legislative Council of India, 1859, pp. 720 and 782-5.

<sup>212</sup> Lord Canning's despatch to the Secretary of State for India, 9 December (No. 5) 1859, para 6, *A Selection of Papers relating to the*

The feathers of the strutting peacock had to be plucked to save the public from frustration and disappointment at a later stage. Another important defect was that the rules were too many and too detailed for such a small body as the Council composed wholly of officials, either in the service of the Company or His Majesty.<sup>213</sup> The effect was to make the procedure very rigid. This would have led to gross delays in legislation if relief had not come from an unexpected source—the provision for the suspension of the Standing Orders.<sup>214</sup>

Apart from these general defects, some special difficulties were experienced in the working of the orders. The numerous petitions received by the Council show that an alert Indian public had at last arisen to watch and warn the Government in respect of its policies, and its role, though yet very small, was quite significant. The British Indian Association of Calcutta, in particular, played a prominent part in voicing the feelings of the Indian community towards the various projects before the Council. Criticism of the manner in which the system of public consultation worked came from two quarters—firstly, from those who felt that the Council was proving to be a run-away horse, and secondly, from the general public. The former complained that the Council was encroaching on the sphere of the executive government and becoming a forum for the ventilation and redress of public grievances. An examination of the

*Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 35.

<sup>213</sup> In the despatch cited in the preceding note, Lord Canning observed rightly, "I think it is to be regretted that the Legislative Council was, on its first creation, invested with forms and modes of procedure so closely imitating those of Parliament. It can scarcely be contended that the 136 Standing Orders by which the proceedings of the Council are ruled are necessary for the guidance of an assembly so small in number and composed as this Council is composed."

"Observances which are indispensable to securing order and opportunities of complete discussion in a house of 656 members, free to come and go at their pleasure, are not needed in a chamber of twelve, nearly all of whom must be always at their posts. They have a tendency to delay business, which in a body so limited would be better conducted by following in the main the simpler forms of a Select Committee of Parliament or of a Royal Commission." *Ibid.*, p. 34.

<sup>214</sup> See p. 162 below.

proceedings of the Council shows that there is little evidence to support the charge. The rule concerning petitions clearly laid down that they must be "connected with the business of the Council" and should conclude "with a distinct prayer".<sup>215</sup> While the Council was often willing to condone technical errors and oversights,<sup>216</sup> it rejected those which did not fall within its jurisdiction. The petitions of Ramratan Bose, a Shirastadar, against his unjust dismissal by the Government, of Sabhapati Pillai against a decision of the Commissioner of Mysore, and of Kotah Krishna Chetty against the decision of the Sadr Court at Madras were rejected during 1854-55.<sup>217</sup> A petition from a prisoner in the House of Correction at Calcutta for remission of the sentence passed on him was rejected in 1856.<sup>218</sup> Similarly, other petitions were rejected in the subsequent years on the ground that they were not connected with the business of the Council.<sup>219</sup> A number of border cases did not lend themselves to such rejection and the expedient adopted in their case was just to file them.<sup>220</sup> The conduct of the Council would have been perhaps exemplary if it were not for the following incident, namely, the presentation of a petition by the inhabitants and tax-payers of Calcutta regarding the finances of India and the acrimonious debate that followed, centering round the grant made to the descendants of Tipu Sultan.<sup>221</sup> Sir Bartle Frere, representing the Government, held that the petitioners had come to the wrong quarter for relief and A. Sconce, the member for Bengal who initiated the discussion on the subject, was playing into their hands. Rejecting the insinuation, Sconce observed that he made the motion as "he personally felt the necessity of explicit information" on the subject, and not because of the petitioners.<sup>222</sup> While this

<sup>215</sup> Standing Orders, No. 22.

<sup>216</sup> Proceedings of the Legislative Council of India, 1860, p. 522; and *ibid.*, 1854-55, pp. 809 & 819.

<sup>217</sup> *Ibid.*, 1854-55, pp. 51, 184 & 764.

<sup>218</sup> *Ibid.*, 1856, p. 529.

<sup>219</sup> *Ibid.*, 1858, p. 476; 1860, p. 318; and 1861, p. 334.

<sup>220</sup> *Ibid.*, 1854-55, p. 106; and 1860, p. 360.

<sup>221</sup> See p. 142 above.

<sup>222</sup> Proceedings of the Legislative Council of India, 1860, pp. 1294, 1310, 1375 & 1390.

petition led to a major dispute between the Legislative Council and the Executive Council with regard to their relative powers, it must be admitted that the incident had no direct bearing on the general policy of the former in respect of petitions. The subject of the Mysore Grant would, in all probability, have been raised even though the petition had not been presented.

Lord Canning and Sir Charles Wood felt that, by the way public petitions were entertained, the Legislative Council had "constituted itself [into] a body for the redress of grievances, and engaged in discussions which led to no practical result".<sup>223</sup> But the Indian public complained against the stringency of the provision concerning the right of a petitioner to be heard either by himself or through counsel in respect of Bills "peculiarly affecting private interests". There appears to have been only one case in which such a prayer was granted, that of Prince Azim Jah Bahadur regarding the Bill to provide for the administration of the estate and for the payment of the debts of the late Nawab of the Carnatic.<sup>224</sup> In three other cases the requests were turned down: the petition of Jai Kishen Mukherjee and Raj Kishen Mukherjee on the Bengal Embankments Bill,<sup>225</sup> the petitions of certain British subjects against the Criminal Procedure (Bengal) Bill,<sup>226</sup> and the petition of the Raja of Burdwan against the Stamp Duties (Bengal) Bill.<sup>227</sup> In a petition on the working of the Council, dated 22 September 1859, the British Indian Association represented that the term "private interests" had been interpreted very strictly and the privilege should be extended to "Bills affecting the interests of a particular class or section of the community".<sup>228</sup> But no step in this direction was taken.

<sup>223</sup> Hansard (III Series), Vol. CLXIII, p. 639.

<sup>224</sup> *Ibid.*, 1858, p. 375.

<sup>225</sup> *Ibid.*, 1854-55, pp. 84, 86 & 93. This was a border case. According to J. P. Grant who served on the Standing Orders Committee reporting on the petition, the House of Commons or any of its committees would have heard counsel in a corresponding case. Papers of Act XXXII of 1855, pp. 243-5.

<sup>226</sup> Proceedings of the Legislative Council of India, 1857, pp. 211-2.

<sup>227</sup> *Ibid.*, 1858, pp. 372-4.

<sup>228</sup> Pub. Dep. Pros., 21 October 1859, No. 35.



Another subject which gave rise to difficulties was that of direct correspondence between the Legislative Council and the Local Governments. As stated earlier, the Council claimed the right and exercised it with the active support of many of the members of the Executive Council.<sup>229</sup> The Local Governments conveyed their views and sentiments on legislative projects to the Legislative Council, either directly or through their "representative" members, and sometimes through the concerned executive department of the Government of India. No great difficulty was normally experienced, but there was one danger inherent in the system. What would happen if the Government of India in its executive capacity and the Local Governments were not agreed on any matter, and the latter were forbidden from communicating their views to the Legislative Council? The question came up prominently in connection with Wilson's Income Tax Bill. Lord Canning and his Executive Council took the stand that it was an all-India measure and the Local Governments should abide by their decision and not carry the controversy to the Legislative Council.<sup>230</sup> Sir C.E. Trevelyan, who had retired from the Company's service and was well known for his liberal views concerning India, was Governor of Madras at the time. Ignoring the specific orders of the Government of India, he directed H. Forbes, Member for Madras, to place the sentiments of himself and his Council before the Legislature and also move for the publication of the papers. He went even a step further and caused the papers to be published in the newspapers at Madras on his personal authority. This was clearly unconstitutional and Trevelyan was promptly recalled by the British Government.<sup>231</sup> Forbes was advised by the Government of India not to carry out the instructions of his Government and to treat the matter as strictly confidential. But, in view of the publicity that had already been given, the papers were confidentially communicated to all the members of the Legislative Council. The question, however, remained

<sup>229</sup> See p. 138 above.

<sup>230</sup> Letter addressed to the Governors in Council at Madras and Bombay, 9 March 1860, Parl. Papers, H. C. No. 339 of 1860, pp. 106-9.

<sup>231</sup> Later on, however, during 1862-63, Trevelyan held the office of the Finance Member of the Government of India.

whether the first attempt of the Government of India to withhold the views of the Madras Government from the Legislative Council did not constitute a serious infringement of its rights and privileges.<sup>232</sup> This was a part of the major problem of executive-legislative relationship for which a solution had yet to be found.

Again, the admission of the public to the meetings of the Legislative Council and the publication of its proceedings came to be regarded by many in high quarters as unfortunate developments. The acrimonious and unsavoury debates during the post-Mutiny period gave strength to this view. Embarrassment to the Government could have been avoided on some of the occasions at least by having recourse to secret sessions. But, surprisingly enough, this expedient was not availed of on any occasion. Although there were many expressions of regret at the Council's sessions being open to the public, the general view was that it was politically highly inexpedient to revert to the earlier practice. Reporting by the press was considered to be of poor quality, but the exclusion of the press would have been again very unpopular. A partial remedy lay in improving the standard of the official reports of the proceedings.<sup>233</sup>

Lastly, we come to the provision which empowered the Legislative Council to dispense with any or all of the Standing Orders in particular cases. This power was availed of frequently in respect of measures concerning law and order which were urgently required. In particular, the Santal rebellion, the outrages in Malabar and the revolt of 1857 presented problems which could brook no delay. It was invoked in the case of Act VII of 1859 and Act X of 1860 relating to customs duties. The justification in such cases was that if an interval of time was allowed between introduction and enactment, mercantile

<sup>232</sup> In writing to the Madras Government on 7 April 1860, the President in Council significantly observed, "In order, however, that you should not have any ground to complain of the suppression of your views from the individual members of the Legislative Council, and especially as a partial circulation of them had already taken place before the circumstance was brought to our knowledge, we have decided that the documents shall be submitted to each member in confidence." *Ibid.*, p. 138.

<sup>233</sup> *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), pp. 31-2, 35, 40 & 53.

transactions would be gravely affected.<sup>234</sup> Its application was found necessary to meet unanticipated contingencies in the following cases, *viz.*, Acts XL and LI of 1860 for amending the Stamp Act (Act XXXVI) of 1860 which was shortly coming into force<sup>235</sup>; the theft of two of the seals of the late Nawab of the Carnatic and the enactment of Act II of 1859 for protecting the Government from being a victim of fraud<sup>236</sup>; Act VII of 1856 for enabling the Government of Bombay to prevent waste and provide due supply of water during the emergency created by the failure of rains<sup>237</sup>; and Act XXIII of 1856 for removing certain doubts which had brought the work of revenue collection in Madras to a standstill.<sup>238</sup> It was also invoked in the case of a number of expiring enactments which had to be renewed, and the Government was at times criticised for not sponsoring them earlier.<sup>239</sup> In these cases it may be said that the provision was put to the use for which it was specially designed.

The provision concerning suspension of the Standing Orders was also put to another kind of use, legitimate but not presumably envisaged earlier, namely, to help in overcoming the extreme rigidity of the orders. By invoking it, many casual errors and oversights were condoned. For instance, the members of the Legislative Council were allowed to submit their minutes of assent and dissent, although they had failed to give notice of their intention to do so in the prescribed manner.<sup>240</sup> Prince Azim Jah Bahadur was permitted to be heard through counsel in respect of the Bill concerning the estate of the late Nawab of the Carnatic, although the Select Committee on the Bill had already submitted its report.<sup>241</sup> Again, the course of procedure was abbreviated to expedite the passing of Bills wanted urgently,

<sup>234</sup> Proceedings of the Legislative Council of India, 1859, pp. 121-6; and *ibid.*, 1860, pp. 149 & 257.

<sup>235</sup> *Ibid.*, 1860, pp. 1025 & 1405.

<sup>236</sup> *Ibid.*, 1859, p. 43.

<sup>237</sup> *Ibid.*, 1856, p. 135.

<sup>238</sup> *Ibid.*, p. 628.

<sup>239</sup> Act XXIX of 1860 (*ibid.*, 1860, p. 729), Act XIX of 1859 (*ibid.*, 1859, p. 513), and Act VI of 1856 (*ibid.*, 1856, p. 493).

<sup>240</sup> *Ibid.*, 1859, pp. 302-9.

<sup>241</sup> *Ibid.*, 1858, p. 375. See also cases referred to in *ibid.*, 1854-55, pp. 809 & 819.

mostly by dispensing with the notices of motion required at different stages.<sup>242</sup> Sometimes, the prescribed procedure was altered to meet special situations. For instance, in the case of the Trades and Professions Bill, a committee of the whole Council discussed it before referring it to a Select Committee.<sup>243</sup> In the case of the Paper Currency Bill, a sixth member was added to the Select Committee by suspending the order which fixed the maximum at five members.<sup>244</sup> No harm was done, perhaps a lot of good resulted, in these cases, since the matters involved were purely internal to the Council and in no way affected the claims of the public to be heard. The members of the Council could be expected to take care that the spirit of the orders was observed and they were not unnecessarily hustled.<sup>245</sup>

From the point of view of the public, the important orders were those which provided for the publication of Bills for general information and also fixed the minimum time to be allowed to make representations. The right of the public to be heard was jeopardised whenever those provisions were suspended. Necessities of state or public interest no doubt justified their suspension in a number of cases as noted earlier. In certain other cases wherein a reference to the public would have been just an empty formality, recourse to this step might well be defended, e.g., measures for repealing enactments vetoed by the Court of Directors and enactments to provide for the absence of the Governor General from the Presidency. There were, however, a few cases in which the spirit of the orders was clearly violated, the Council taking upon itself to decide whether the public would be interested in a Bill, or whether public opinion had expressed itself sufficiently on it. To cite a few prominent examples, in the case of the Income Tax Bill and the Licensing of Arts, Trades and Professions Bill, the Select Committee was asked to report within three weeks. The justification offered was that the subject had been before the public for long and had

<sup>242</sup> *Ibid.*, 1854-55, pp. 39-40, 50, 78 & 169; *ibid.*, 1858, p. 175; *ibid.*, 1859, p. 813; *ibid.*, 1860, p. 546; and *ibid.*, 1861, pp. 1104 & 1106.

<sup>243</sup> *Ibid.*, 1859, p. 707.

<sup>244</sup> *Ibid.*, 1861, p. 38. Also see cases referred to in *ibid.*, 1854-55, p. 81; and *ibid.*, 1861, p. 1105.

<sup>245</sup> Proceedings of the Legislative Council of India, 1859, pp. 121-6.

been sufficiently discussed, and it was, therefore, unnecessary to adhere to the usual procedure.<sup>246</sup> In the case of the Bill for the establishment and maintenance of boundary marks in Madras, the Select Committee was asked to report within one month. This was considered necessary "to avoid the great delay which was now constantly occurring to the survey and assessment officers".<sup>247</sup> In the case of Sir Jamsetjee Jejeebhoy's Estate Bill, it was held that it was a private Bill in which the public had no interest.<sup>248</sup> In the case of the Bills for incorporating the Universities of Calcutta, Bombay and Madras, very little time was allowed to the public for expressing its views after their publication.<sup>249</sup> These attempts to suspend the Standing Orders did not always go unchallenged.<sup>250</sup> On the whole, however, it may be said that the Legislative Council was, during this period, much more mindful of the need to give the public sufficient opportunity to express its views than in the earlier period.

In conclusion, it may be observed that the main difficulty experienced in the working of the Legislative Council constituted under the Charter Act of 1853 was in its assertion of "independence"—its refusal to be controlled either by the Executive Council or the Court of Directors and the Secretary of State for India within what it deemed to be its legitimate sphere of activity. There were also increasing signs of the Local Governments and the general public becoming restive at their not having adequate opportunity to influence and shape legislative

<sup>246</sup> The move was strongly opposed by the Government of Madras. Letter from the Governor in Council, Madras, to the President in Council, 26 March 1860, Parl. Papers, H. C. No. 339 of 1860, p. 111. Answering the criticisms of Le Geyt, Member for Bombay, Sir Bartle Frere observed, "There was nothing magical or peculiarly constitutional in the period of three months usually assigned for the consideration of all projects. It was in ordinary cases a convenient period to fix, but the time proposed in the present case was ample for the fullest discussion of the Bills before the Council." Proceedings of the Legislative Council of India, 1860, pp. 394-8.

<sup>247</sup> *Ibid.*, p. 460.

<sup>248</sup> *Ibid.*, 1858, p. 495.

<sup>249</sup> *Ibid.*, 1857, pp. 14, 223 & 322.

<sup>250</sup> *Ibid.*, 1855, pp. 477-8; *ibid.*, 1859, pp. 513 & 736; *ibid.*, 1860, pp. 23 & 1172; and *ibid.*, 1861, p. 416-22.

policy. The routine functioning of the Council, however, was on the whole satisfactory, and there was general praise, even from its critics, for the number and importance of the measures it succeeded in placing on the statute book.

## CHAPTER IV

### THE LAW COMMISSIONS AT WORK

#### *A. The First Indian Law Commission*

##### *Members of the Commission*

FROM our study of the Legislative Council of India at work, we shall pass on to a consideration of the role of the first two Law Commissions which were set up to aid the Council in carrying out the extensive schemes of reform chalked out by Parliament. With regard to the membership of the first Commission set up by the Charter Act of 1833, the only statutory directions were that there should be not more than five members, that the Governor General in Council should issue commissions to such persons as were recommended by the Court of Directors with the assent of the Board of Control, and that, if after such commissions were issued, any seat remained unfilled, he should fill it up, if he considered necessary, at his discretion.<sup>1</sup> The Court of Directors, in making its first recommendations, expressed the view that "the Commission should possess among its members . . . a knowledge of the law of England and of the general principles of jurisprudence", which might be best provided for by the appointment of an English lawyer. All other species of knowledge, it felt, might be had from the Company's own civil servants, and it was desirable to include one civilian from each of the three Presidencies. The Directors also thought that there might be some advantage in nominating the Fourth Member of the Council as a member of the Commission, but they preferred to wait till more experience had been gathered in the working of the system.<sup>2</sup> The authorities in India, both in the time of Bentinck and Auckland, were generally favourable to the inclusion of the above elements.<sup>3</sup> In addition, they were

<sup>1</sup> 3 & 4 Wm. IV, c. 85, s. 53.

<sup>2</sup> Public Letter from Court, 16 July (No. 41) 1834.

<sup>3</sup> To give a sample of the views expressed, Macaulay wrote, "In this country, therefore, I conceive that a Commission composed partly of

strongly in favour of including a person from outside the Company's service who was closely associated with the business and industrial world and thoroughly conversant with Indian affairs.<sup>4</sup> Although the Court of Directors did not express itself directly against this suggestion, its instructions were not in doubt. Only one temporary appointment was made by the Governor General in Council on this basis, and for the rest appointments were made mostly in accordance with the principles laid down by the Directors. Great stress was laid on the calibre of persons to be appointed as Commissioners. To ensure good selection, Parliament laid down that their salaries should be fixed "according to the highest scale of remuneration given to any of the officers or servants of the India Company below the rank of Members of Council".<sup>5</sup> Their salaries were accordingly fixed at Rs. 50,000 per annum, this being the highest rate of salary

persons sent out from England and partly of members of the Civil Service is most likely to succeed in the work of framing a code." Leg. Dep. Pros., 2 January 1837, No. 3. Lord Auckland expressed the view that two persons should be selected from the community at large, either in England or in India, for their high abilities and character and attainments in jurisprudence, and the remaining members, together with the Secretary, should be chosen from the services at the different Presidencies. *Ibid.*, No. 1. A. Ross, the radical member of Auckland's Council, wanted the Commission to be wholly composed of persons from outside the Civil Service, since he was afraid that civilians as a class would be strongly inclined to favour the system administered by them, and generally averse to change. *Ibid.*, No. 4. The inclusion of the Fourth Member had the support of everyone in the Council, excepting A. Amos. See pp. 171-3 below.

\* Lord Bentinck wrote, "There is a great class of interests and feelings totally unrepresented in the Commission, trade, foreign commerce, agriculture and manufactures, carried on by European capitalists, colonization with all its dependent and ramifying branches. There ought to be some kindred voice in the Law Commission for the protection of these parties and for affording the necessary information." Judicial (Civil) Proceedings, 19 February 1835, No. 12. Lord Auckland expressed himself equally strongly and observed that in the absence of such representation "our arrangements must be felt to be defective". Leg. Dep. Pros., 2 January 1837, No. 1. A. Ross, as stated in the preceding note, would have the Commission composed of such elements to the total exclusion of the civilians.

<sup>5</sup> 3 & 4 Wm. IV, c. 85, s. 55.



permitted by the Court of Directors to any person holding such a rank.<sup>6</sup>

Of the persons appointed as Commissioners, knowledge of English law and general jurisprudence was provided by the Fourth Members of the Council, who presided over the Commission.<sup>7</sup> In addition, C. H. Cameron<sup>8</sup> provided this type of experience as an ordinary member of the Commission prior to his elevation as the Fourth Member (12 August 1835—14 February 1843, except for a break of two months). As for the civilian element, Bombay was represented by G. W. Anderson<sup>9</sup> (19 February 1835—7 March 1838) and H. Borradaile (23 December 1839—4 March 1844). Madras was represented by J. M. Macleod<sup>10</sup> (19 February 1835—7 March 1838) and D. Elliott<sup>11</sup> (14 January 1839—14 February 1848). Bengal was represented by Frederic Millett<sup>12</sup> (2 January 1837—16 April 1844); in addition the Secretaries of the Commission—

<sup>6</sup> Judicial (Civil) Proceedings, 19 February 1835, No. 6, and Leg. Letter from Court, 25 January (No. 2) 1837.

<sup>7</sup> See pp. 108-09 above.

<sup>8</sup> Cameron was a fervent Benthamite and his appointment to the Commission was presumably due to the influence of James Mill. He had been Mill's candidate for the chair of philosophy at University College, London. Eric Halévy, *The Triumph of Reform, 1830-41* (London, 1950), p. 123.

<sup>9</sup> Anderson had taken part in the drafting of the Elphinstone Code and had distinguished himself as a judge of the Sadr Court at Bombay. He later became a member of the Governor's Council at Bombay and Governor of Ceylon. G. C. Rankin, *Background to Indian Law* (Cambridge, 1946), p. 201.

<sup>10</sup> Macaulay found in Macleod "the most remarkable exhibition of dialectics he had ever met with in his life". Evidence of Sir Erskine Perry, Parl. Papers, H. C. No. 20 of 1852-53, Q. 2677. Macleod was a member of the second and third Indian Law Commissions also.

<sup>11</sup> Later, Elliot was the member from Madras on the Legislative Council of India from June 1854 to 1858.

<sup>12</sup> Millett prepared a digest of civil procedure which would have been passed into law if the Law Commission had not been there with a more ambitious programme. He was a member of the Governor General's Council from April 1844 to December 1848. Lord Dalhousie considered him to be a "a man of excellent judgment and temper, and the most indefatigable worker that ever toiled". W. Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904), Vol. II, p. 256.

F. Millett, J. P. Grant and J. C. C. Sutherland—were all Bengal civilians. The only person associated with commerce and industry, and selected from outside the Company's service in India, was James Young.<sup>13</sup> He was appointed only to temporary vacancies (22 January 1838—22 December 1839) and was not able to obtain a permanent commission. On the general calibre of the Commissioners, Sir Erskine Perry, who retired as the Chief Justice of the Supreme Court at Bombay, observed, "I think the Law Commission was a very happily constituted body, a body comprising able jurists from this country, and the most able civilians you could find in the Company's service acquainted with judicial matters, though I am bound to add, from their own testimony to myself, they were not in all cases well fitted for those duties."<sup>14</sup>

The actual strength of the Commission varied from time to time, its maximum strength having been fixed by the Statute at five. At the time of its first constitution the Court of Directors made only four nominations and directed that the fifth place should be left unfilled for the time being.<sup>15</sup> Bentinck also felt that it was not yet necessary to have the Commission in full strength.<sup>16</sup> But as its work proceeded, great difficulties were experienced owing to the temporary absence of members due to illness. Since the nature of its work was such that purely temporary appointments would have been of little use, it was later considered highly desirable to maintain it at its optimum strength.<sup>17</sup> It had four members from its inception in February 1835 to the end of 1838, except for a brief interval, and five members during the next four years. In 1843 the Court of Directors decided upon the abolition of the

<sup>13</sup> Lord Bentinck entertained the highest opinion of him and this was shared by Lord Auckland and his Council. *Judicial (Civil) Proceedings*, 19 February 1835, No. 12; Governor General's Letter to Court, 12 February (No. 1) 1838; and Auckland's letter to Hobhouse, dated 9 February 1839, British Museum, Add. Mss., 36473, f. 422.

<sup>14</sup> Parl. Papers, H. L. No. 20 of 1852-53, Q. 2674.

<sup>15</sup> Public Letter from Court, 16 July (No. 41) 1834.

<sup>16</sup> *Judicial (Civil) Proceedings*, 19 February 1835, No. 10.

<sup>17</sup> Minutes by Auckland and Ross, Leg. Dep. Pros., 2 January 1837, Nos. 1-2. Also, Leg. Letter from Court, 16 August (No. 10) 1837.

Commission and directed that no further appointments should be made. As will be noticed later on in the chapter, its strength rapidly dwindled until it ceased to exist:<sup>18</sup> of the five persons who were its members in 1843, A. Amos left in February of the year, H. Borradaile and F. Millett in March-April 1844, and C.H. Cameron and D. Elliott in February 1848.

As regards the part played by the Governor General in Council in the appointment of the members of the Commission, as already stated, Parliament had given him authority to fill up only those vacancies for which the Court of Directors did not make nominations. He could not exercise this power with the freedom that was perhaps intended, because the Directors issued orders from time to time whether particular vacancies should be filled up.<sup>19</sup> Except in the case of the first appointments to the Commission, however, the Court of Directors did not make nominations. Whenever there was a vacancy, it was filled by the Governor General in Council, and no difficulty was experienced in obtaining the approval of the Directors.<sup>19</sup> Only in the case of James Young, the attempt to obtain for him a commission in a substantive capacity did not succeed. On one or two occasions, the Government of India acted contrary to the instructions of the Directors owing to certain special circumstances, and its actions were later approved by the Directors.<sup>20</sup>

### *Presidentship of the Commission*

The Charter Act of 1833 gave no direction with regard to the Presidentship of the Commission or the appointment of the Fourth Member of the Council as one of its members. The

<sup>18</sup> Public Letter from Court, 16 July (No. 41) 1834.

<sup>19</sup> Leg. Letters to Court, 2 January (No. 2) 1837; 1 May (No. 6) 1837; and 1 May (No. 3) 1838. Leg. Letters from Court, 20 December (No. 11) 1837; 1 June (No. 6) 1838; 8 August (No. 12) 1838; and 19 June (No. 7) 1839.

<sup>20</sup> The Directors' nomination of W. H. Macnaughten was not acted upon by the Government of India as his services as Secretary to the newly established Legislative Department were considered indispensable. Judicial (Civil) Proceedings, 19 February 1835, No. 10, and Leg. Letter from Court, 25 January (No. 2) 1837. Again, F. Millett was appointed as fifth

latter suggestion was contained, as already noted, in a letter from the Court of Directors, dated 16 July 1834, with the proviso that this might be considered when some little experience had been gained in the working of the system.<sup>21</sup> When the time came for commencing the work of the Commission, however, on 25 May 1835, Macaulay was invited by Lord Bentinck and his Council to be its President in addition to his own duties as the Fourth Member, and he accepted the offer.<sup>22</sup> There is no record of the discussions leading to this decision, but it appears to have been based upon Macaulay's own suggestion. The question was considered again when the work of the Commission came to be reviewed at the close of 1836. In seeking the approval of the Court of Directors to "the principle of uniting ordinarily in one person the office of the Fourth or Legislative Member of the Council, and of Member of the Law Commission," Lord Auckland pointed out that objection had been taken to it on the ground that it decreased "the probability of the measures prepared and submitted by the Commission being subjected to a perfectly complete and impartial reconsideration by the Council". Stating his own view of the matter, he observed that the Commissioners should be considered "rather as legislative assessors to the Council than as an entirely separate body", and the union of the two posts in the same hand was the best way of "keeping the Council in unreserved communication and in general harmony with the Commission" and avoiding "much of inconvenient, and probably of unprofitable, collision" between them. His views were endorsed by the members of his Council, Ross, Shakespeare and Macaulay, the last of these observing that his office "would be little more than a lucrative sinecure if he were not also a member of the Law Commission."<sup>23</sup> The Court of Directors approved Macaulay's appointment as the President of the Commission by

Member contrary to the orders of the Directors owing to certain special circumstances. Leg. Dep. Pros., 30 October 1837, Nos. 1-4.

<sup>21</sup> Public Letter from Court, 16 July (No. 41) 1834.

<sup>22</sup> Leg. Dep. (Civil) Proceedings, 15 June 1835, Nos. 1-2.

<sup>23</sup> Leg. Dep. Pros., 2 June 1837, Nos. 1-6. Also, Judicial (Civil) Proceedings, 15 June 1835, No. 2.

Bentinck,<sup>24</sup> and also gave specific sanction to the union of the two posts as desired by Auckland.<sup>25</sup>

This arrangement worked smoothly as long as Macaulay was the Fourth Member. His successor, Andrew Amos, however, expressed his strong disinclination to accept the Presidency of the Commission. In addition to the very doubtful propriety of requiring the Fourth Member to review his own work as the President of the Commission, he urged that the legitimate duties of his office, which had greatly increased since the days of Macaulay, came in the way of his acceptance: he had to take an active part in the proceedings of all the Departments of the Government and act as their legal adviser; he had to pay attention more than ever before to current legislation, since cases coming within this category were no longer referred to the Commission; in addition, he had to revise the penal code submitted by Macaulay in the light of the large number of adverse opinions which had been received. Disagreeing with Macaulay, he expressed his decided opinion, "The business of the Fourth ordinary Member of Council is so much the reverse of a sinecure that the addition of any other interesting function would considerably diminish the communications, the labour and the reflection, which are not necessary to protect the Fourth Member from any charge of incompetency, but which he might devote most beneficially to the current legislation."<sup>26</sup> He was supported in the stand he took by the other members of the Council, W. W. Bird and A. Ross. The latter added a further point to the argument that under the existing arrangements the Fourth Member would not be able to accompany the Commission on tours, which, in his capacity as President, it would be highly desirable for him to do. Auckland, however, reiterated his earlier view that the union of the two posts was essential "to preserve the closest harmony and connection between the proceedings of the Legislative Council and of the

<sup>24</sup> Leg. Letter from Court, 25 January (No. 2) 1837.

<sup>25</sup> Leg. Letter from Court, 16 August (No. 10) 1837.

<sup>26</sup> Minute by Amos dated 25 June 1838, Leg. Dep. Pros., 25 June 1838, No. 3. Also, Leg. Dep. Pros., 16 April 1838, No. 5, and 7 April 1843, No. 18.

Law Commission";<sup>27</sup> he was unconvinced that the duties of the Fourth Member had so far increased since the days of Macaulay as to justify the contention of Amos. The arguments as restated by Amos and the decided opinion expressed by the other members of the Council, however, greatly weakened his disposition to continue the combination of the two offices, but he was desirous that the question should be referred to the Court of Directors for orders.<sup>28</sup> The Directors concurred with Auckland and instructed that the Fourth Member should also be the President of the Commission.<sup>29</sup> Amos accordingly took charge on 28 January 1839,<sup>30</sup> his appointment to the office having been held in abeyance for nearly an year. This arrangement of the Fourth Member being also the President of the Commission continued without any further hitch till the retirement of C. H. Cameron in 1848.

### *General Policy and Procedure of the Commission*

Although the power of appointing the members of the Commission was retained by the authorities in England, the Charter Act placed the body wholly under the direction and control of the Governor General in Council,<sup>31</sup> and it was for the latter to make the best use of the Commission to achieve the purpose for which it was constituted. Success in legislation naturally depended very much on the two bodies working in harmony

<sup>27</sup> Governor General's Letter to Court, 1 May (No. 3) 1838. Also, Auckland's letter to Hobhouse, dated 9 April 1838, British Museum, Add. Mss., 36473, ff. 240-1.

<sup>28</sup> Leg. Dep. Pros., 20 August 1838, Nos. 32-3, and Leg. Letter to Court, 20 August (No. 16) 1838. Writing to Hobhouse on 9 February 1839, Auckland said that he did not press his view more strongly, because "all at Calcutta were the other way and assuredly he [Amos] makes the Legislative Council no sincere though perhaps he often labours hardly where hard labour is not required". British Museum, Add. Mss., 36473, f. 422.

<sup>29</sup> Leg. Letters from Court, 8 August (No. 12) 1838 and 19 June (No. 7) 1839.

<sup>30</sup> Leg. Letter to Court, 4 February (No. 5) 1839.

<sup>31</sup> Matters pertaining to the Commission were at first handled by the Judicial Department, and later, after its creation in June 1835, by the Legislative Department.

and close co-operation. The Governor General in Council determined from time to time the subjects upon which the Commissioners were to institute enquiries and submit their reports. Such instructions were mostly of a general nature. Only in exceptional cases the Commission was asked to frame rules or draft Bills on the basis of sentiments previously expressed by the Government. In the course of their enquiries the Commissioners were free to examine all officers of the Government, call for any papers,<sup>32</sup> and correspond directly with the Supreme Courts.<sup>33</sup> They could also communicate with the public whenever,<sup>34</sup> as in the case of the penal code, they considered it necessary. They were not, however, permitted to go on tours to collect information.<sup>35</sup> The reports which they submitted, together with the Government's proceedings connected with them, were placed before Parliament, and they became public documents.

As regards the work entrusted to the Commission, legislation at that time involved, firstly, preparation of comprehensive general codes, and, secondly, making of appropriate laws to meet current requirements. The first of them came within the legitimate sphere of the Commission's activities, but not the second. However, when it commenced its work about the middle of 1835, its assistance was sought regularly in connection with detached legislative measures which came up before the Governor General's Council from time to time, and there was a strong tendency to associate it with the entire field of legislation. This put a severe strain on its time and energy and came in the way of the preparation of the general codes. Personnel problems, such as the illness of its members, added to its difficulties. After it had worked for about eighteen months, the Government

<sup>32</sup> Text of the Commission issued to the members of the Commission, Judicial (Civil) Proceedings, 19 February 1835, No. 13.

<sup>33</sup> Leg. Letter to Court, 17 August (No. 9) 1836, paras 50-1.

<sup>34</sup> Leg. Dep. Pros., 20 July 1835, Nos. 18-9.

<sup>35</sup> C. H. Cameron testified that the Commission wanted to tour the country while making enquiries regarding certain disputes between indigo planters and cultivators and also on the subject of slavery. The Government of India refused permission on both the occasions. On the second occasion, the Law Commission entered a formal protest. Parl. Papers, H. L. No. 88 of 1852, Q. 1990-2.

of India decided that it should confine itself to the preparation of the general codes and it should not be troubled in any way with the work of current legislation, except in respect of measures "extensively affecting the rights of any large community" or those having a close bearing on the projected codes. While the main object of this decision was to give it some relief, Auckland observed that it was not also "perhaps in accordance with the design of the Legislature that there should always be a dependence of the Legislative Council upon the Law Commission" in such cases.<sup>36</sup> Under this arrangement the Commissioners were to devote their entire attention to the work of general codification.

The ideal before the Commission was that the codes should be comprehensive, encompassing the entire field of law, procedural and substantive, in respect of all classes of people, Indian or European, in the whole of British India. This had been laid down by Parliament and was what the country also required. The Governor General in Council selected from time to time the specific subjects upon which the Law Commissioners were to make their enquiries and submit their reports. At the beginning, the choice lay between civil procedure and criminal law. Since the judicial reforms of 1831 by Bentinck, the need for a revision of the procedural law had been greatly felt. In 1833, Frederick Millett was appointed to consolidate the law in respect of civil procedure with such essential changes as he might consider necessary. The draft that he prepared had the approval of the judges of both the Calcutta and Allahabad Sadr Courts and was ready at this time for consideration by the Governor General's Council. One of the members of the Council, H. T. Prinsep, strongly urged that a beginning should be made with this subject, because work on it had reached an advanced stage and there was more urgent need for reform in this field than in any other.<sup>37</sup> Opposing this

<sup>36</sup> Leg. Dep. Pros., 2 January 1837, Nos. 1-6, and Leg. Letter to Court, 2 January (No. 2) 1837. The approval of the Court of Directors to this decision was conveyed by Leg. Letter from Court, 16 August (No. 10) 1837.

<sup>37</sup> Minute by H. T. Prinsep, 11 June 1835, Judicial (Criminal) Proceedings, 15 June 1835, No. 2.



proposal, Macaulay observed that Millett's draft was only a work of consolidation and not of revision, and it would take several months before the materials already collected would be ready to be placed before the Commission. In his view, the subject of penal law was better suited for making a beginning, because the ground for such an undertaking had been fully prepared by earlier jurists and as such the work would prove quite easy.<sup>56</sup> There was another important consideration which made it desirable to commence with this subject. Parliament had directed the Government of India to take early steps to prevent European settlers from oppressing the people of the country. To achieve this object the first step was clearly to place the settlers within the jurisdiction of the Company's Courts in the mofussil areas; but it was highly inexpedient to do this "without first carefully revising the constitution of those Courts, the laws which they administer and the rules of

<sup>56</sup> Macaulay wrote: "There is no department of the law which so early attracted the attention of the philosophers or which still excites so general an interest among reflecting and reading men. It is now more than seventy years since the famous treatise *Die delitte e delle pere* acquired an European reputation and from that time down to the present day a succession of men, eminent as speculative and as practical statesmen, has been engaged in earnest discussion on the principles of penal jurisprudence. There is perhaps no province of legislation which has been so thoroughly explored in all directions."—Minute dated 4 June 1835, *ibid.*, No. 1. Prinsep strongly dissented from this view. He felt that full information as to the criminal laws in force in India and opinion as to their working should first be collected, and they could hope to commence the work of codification "some ten years hence". *Ibid.*, No. 2. In 1830, C. E. Grey and E. Ryan, judges of the Supreme Court at Calcutta, expressed views similar to those held by Macaulay. They wrote, "Any one intelligent English lawyer, and one of the civil servants employed in the Nizamut Adawlut, with the assistance of the reports that Court recently published, might jointly prepare a Regulation in a few months, which would be for all persons throughout India as good a penal code as any now existing in the world."—Some observations on a suggestion by the Governor General in Council as to the formation of a code of laws for the British territories in the East Indies, Parl. Papers, H. C. No. 320 E of 1831, p. 114. As Eric Stokes has rightly observed, in making this observation, the judges had undoubtedly in mind the consolidation of existing law and not the Benthamite code which Macaulay intended. *The English Utilitarians and India* (Oxford, 1959), p. 221.

procedure which they follow".<sup>39</sup> In the very hopeful atmosphere of the time, the work of Millett would not be held up for long either: the penal code would be ready during the winter of 1836-37; the code of criminal procedure would be finished in 1837; and in the beginning of 1838, the Law Commission would be in a position to enter on the work of framing the code of civil procedure.<sup>40</sup> Macaulay's views prevailed, and the Commission was directed to take up the preparation of a penal code.<sup>41</sup> The Court of Directors approved of the decision.<sup>42</sup> In the instructions to the Commissioners, drawn up by Macaulay, "Bentham's principles of punishment and his criteria for a code" found clear expression.<sup>43</sup> The work on the code took over two years and the Commission submitted its final printed report on 31 December 1837. Its recommendations did not, however, find immediate acceptance and it was not till 1860 that the code became law. The delay in its enactment gave strength to the view, expressed often in later years,<sup>44</sup> that procedural laws should have been taken up first for codification. There is nothing, however, to prove that the selection of penal laws instead was in any way unwise, or that a code of procedural laws, framed on Benthamite principles, would have met with a better reception.

Following the submission of the report on the penal code,

<sup>39</sup> Judicial (Criminal) Proceedings, 15 June 1835, No. 1. In his evidence before the Select Committee of Parliament in 1853, Sir Edward Ryan observed that this was the principal motive for taking up first the codification of penal laws. Parl. Papers, H. L. No. 20 of 1852-53, Q. 2357 & 2447.

<sup>40</sup> Macaulay's minute of 6 June 1836. Leg. Dep. Progs., 3 April 1837, No. 28.

<sup>41</sup> Judicial (Criminal) Proceedings, 15 June 1835, No. 3. Also, Leg. Letter to Court, 24 August (No. 2) 1835, para 117.

<sup>42</sup> Leg. Letter from Court, 1 March (No. 4) 1837.

<sup>43</sup> Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), p. 222.

<sup>44</sup> Sir George Campbell, *Modern India* (1852), p. 521. In his minute of 21 October 1842, A. Amos, a later Fourth Member, observed that the draft penal code of Macaulay had often been consulted with advantage, but "questions of police, of criminal procedure, of prison discipline and of transportation were of more practical importance than a mere code of definitions and punishments". Parl. Papers, H. L. No. 263 of 1852, pp. 455-6.

the Commission was called upon to take up the work on the procedural codes,<sup>45</sup> but it was flooded at the same time with a number of particular references. It had first to report on the subject of slavery, to which Parliament and British public opinion attached the greatest importance. Its time was then taken up with a petition of the East Indians that led to its well-known *Lex Loci* Report, the reform of the Court of Requests, the proposal to abolish the Provincial Courts in the Madras Presidency, etc. As a result, although the Commission and the Government continued to talk in terms of general codes,<sup>46</sup> and the Commission viewed every subject referred to it in this larger perspective and made suggestions which could well be incorporated in them, the preparation of these codes faded into the background, and almost every report of the Commission had reference to some specific legislative project which the Government wanted urgently. This development appears to have been by no means accidental. It coincides with the departure of Macaulay and Ross and the coming in of Amos and the succession to the Governor General's Council of persons with not much or no faith in codification like W.W. Bird, H.T. Prinsep<sup>47</sup> and T. H. Maddock. Even Auckland was only a lukewarm reformer and did not share Bentinck's warmth towards Benthamism.<sup>48</sup> The new group seems to have been able to draw the Commission gradually away from the work of general codification and employ it on what it considered to be subjects of greater moment without raising the question of policy involved in the matter. Further, with the death of Mill in 1836, a great moderating influence was gone, and for some

<sup>45</sup> Leg. Dep. Pros., 5 June 1837, Nos. 2-3.

<sup>46</sup> Leg. Letter to Court, 26 May (No. 9) 1838. Leg. Letter from Court, 12 December (No. 18) 1838. In their *Lex Loci* Report of 1840, the Commission observed that it had in contemplation the codification of the substantive laws also on the following basis: the Hindu Law for the Hindus, the Muhammadan Law for the Muhammadans, and the English Law for everybody else. Parl. Papers, H. C. No. 585 of 1842, p. 465.

<sup>47</sup> H. T. Prinsep joined the Council in a substantive capacity on 12 February 1840. He had been a member of the Council temporarily during 1835.

<sup>48</sup> Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), pp. 237 & 240.

years the judicial despatches from the Court of Directors were 'firmly anti-Benthamite in tone'.<sup>49</sup>

While the Commission submitted reports on a variety of subjects, success in legislation depended upon their being accepted by the Governor General in Council and translated into enactments. Unfortunately, for reasons specified later, the Government did not see eye to eye with the Commission on most matters, and very few of its schemes of any importance found their way into the statute book. The slow progress in the work of the Commission, its alleged doctrinaire and impractical schemes, and the absence of any striking results led the authorities, both in India and England, to the conclusion that it was a useless burden on the exchequer. It was accordingly decided in 1843 to seek Parliament's sanction for its abolition and in the meanwhile to refrain from making further appointments to that body. The question was, however, not referred to Parliament at all, and the Commission had a nominal existence till the close of the Charter period. But the most active part of its life may be said to have come to an end by the beginning of 1844. The only major achievement after this period was the revision of Macaulay's penal code and the preparation of a draft scheme of procedure suited to it. The failure of the Commission created great disappointment, because its establishment had symbolised the new spirit of reform and much was expected from its activities. To enable us to have a full and correct appreciation of its work and to understand the causes and circumstances of its failure, we shall first trace the history of the schemes put forward by it and the reception they had at the hands of the Government.

### *Reports of the Commission and their Implementation*

#### *Penal Code*

The draft penal code, which was submitted in December 1837 for the consideration of the Government, was the most significant and historic contribution of the Commission.<sup>50</sup> It was to

<sup>49</sup> Stokes, *op. cit.*, p. 188.

<sup>50</sup> C. H. Cameron and J. M. Macleod, members of the Commission, and Sir Edward Ryan, puisne judge of the Supreme Court at Calcutta, were

supersede the English criminal law in the Presidency towns and the Muhammadan and all other penal laws in the mofussil areas in the whole of British India. Auckland and his Council had many points of criticism against it. In particular, they observed that perspicuity had been sacrificed too much in favour of preciseness, and some of the definitions, "as at present drawn and standing by themselves, would repel and perplex every reader". But their approach on the whole was one of sincere welcome, with a faith that its final adoption at an early date would present no insuperable difficulty.<sup>51</sup> They considered it, however, necessary to circulate the code for some months, both in India and England, and have it revised by the Commission in the light of the opinions received.<sup>52</sup> The Court of Directors endorsed this cautious approach because on the Commissioners' own statement it was "not a digest of any existing system, and that no existing system had furnished them even with a groundwork". It was necessary to view the code in relation to the whole system of laws prevalent in the country.<sup>53</sup>

Most of the opinions were received by 1840, but no concrete step towards their consideration was taken for some years. While posterity hailed Macaulay's code as "a work of genius",<sup>54</sup> the opposition it met with is hardly surprising. It was not

of help to Macaulay in framing the code. In his letter to his sister, Macaulay wrote that owing to the illness of his two colleagues the work "almost entirely" fell on him. W. Stokes, *The Anglo-Indian Codes* (Oxford, 1887), Vol. I, p. 71, and G. O. Trevelyan, *The Life and Letters of Lord Macaulay* (London, 1931), Vol. I, pp. 318 & 417.

<sup>51</sup> In his minute dated 20 May 1837, Auckland wrote, "The draft before us is indeed but a fragment of the work proposed. Less than all the rest will it have to grapple with any of the prejudices, which caste, religion, habit, or interest may excite against these changes and I sincerely wish that in its perfect success may be marked the advantages of clearness and conciseness, and uniformity in the law." Also, see letter from the Governor General in Council to the Law Commission, dated 5 June 1837, Leg. Dep. Pros., 5 June 1837, Nos. 2-3.

<sup>52</sup> Auckland's minutes, dated 12 February and 13 April 1838, and circular letters of the President in Council, dated 12 February and 7 May 1838, Parl. Papers, H. L. No. 263 of 1852, Nos. 44-51 & 53-7.

<sup>53</sup> Leg. Letter from Court, 6 March (No. 3) 1839.

<sup>54</sup> Courtenay Ilbert, *The Mechanics of Law Making* (New York, 1914), p. 166.

based, as its author proudly claimed, on a comparative study of existing legal systems and their practical working. It was "created *ex nihilo* by the disinterested philosophic intelligence".<sup>55</sup> Its philosophic spirit and universality of outlook were derived from the great master Bentham. These qualities were indeed unique, and were not shared by the later codes, which were no more than rationalised digests.<sup>56</sup> In the words of Fitzjames Stephen, Lord Macaulay's great work was far too daring and original to be adopted at once,<sup>57</sup> and it is not surprising that the period of gestation was prolonged. Further, it was singularly unfortunate that Macaulay should have been succeeded by Andrew Amos, who was wholly opposed to his predecessor's basic approach. According to him, among other things, its great weakness lay in its being not based on a thorough study and understanding of the laws in force in the country. From his examination of these laws and from the experience he had gained in India, he had come to the conclusion that they were not in such an unsatisfactory condition as was often made out, and, in many instances, "little modification and sometimes no change at all was requisite in the existing provisions of the law." The country did not need the code urgently, and the defects noticed by him were such that "it would not be expedient implicitly to follow the code". He, therefore, felt that there should be no hurry in enacting it, and it should be allowed to mature slowly.<sup>58</sup> With the Fourth Member, whose responsibility it was to guide the code through the Legislative Council,

<sup>55</sup> Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), p. 225. For a study of Benthamite ideas enshrined in the Penal Code, see pp. 225-33 of the book.

<sup>56</sup> *Ibid.* pp. 224-31.

<sup>57</sup> *Life and Letters of Macaulay* (Edinburgh Edition, 1903), Vol. IX, p. 421. H. G. Tucker, a well-known member of the Court of Directors, expressed the commonly-held view when he wrote that the code bore "the character of a legal dictionary or philosophical treatise on criminal law, with examples in illustration, of the definitions, after the manner of Johnson's folios". J. W. Kaye (Ed.), *Memorials of Indian Government* (London, 1853), p. 371.

<sup>58</sup> Minute dated 21 October 1842, Parl. Papers, H. L. No. 263 of 1852, pp. 455-6. Also, Amos's minute dated nil, Leg. Dep. Pres., 20 August 1838, No. 33.

sitting in the opposition, not to speak of the doubts and fears of the other members, it is not surprising that no further action was taken on it during the last two years of Auckland's regime. Conditions were all the more unpropitious in the time of Ellenborough, because the new Governor General and his Council (except Amos and his successor Cameron) were dead against the Commission and the whole project of codification.<sup>59</sup> The code came up before the Council at the end of 1842. In his minute of 21 October 1842, Amos detailed his objections to it, and also observed that the opinions of some important persons had not yet been received. The latter consideration apart, the subject of criminal law was being investigated by a commission in England and it was advisable to await its report, which was expected at an early date.<sup>60</sup> The other members of the Council agreeing with him, the Court of Directors was informed that the Council was not yet prepared to take up the question "whether to introduce generally the whole or any particular chapters of this criminal code in their present form".<sup>61</sup> The Directors had not much faith in the Commission and were not interested in expediting the enactment of the code.<sup>62</sup>

The subject was taken up again only after the departure of Ellenborough. The atmosphere was now favourable. The new Governor General Hardinge was well disposed towards the Commission,<sup>63</sup> and C.H. Cameron and F. Millett, who had been

<sup>59</sup> As regards the code itself, Ellenborough observed on a later date, "I have never studied the code attentively myself, but I will venture to tell your Lordships that I have heard it often discussed with considerable zeal in India, and that I have never happened to meet with one single gentleman who was not a philosophical English lawyer who approved of it." *Hansard (III Series)*, Vol. CXXVIII, pp. 18-9.

<sup>60</sup> *Parl. Papers*, H. L. No. 263 of 1852, pp. 455-6.

<sup>61</sup> *Leg. Letter to Court*, 2 December (No. 29) 1842.

<sup>62</sup> H. G. Tucker, writing to Sir Robert Peel in 1842, observed, "The 'Macaulay Code', as it is called, which cost us no less than 100,000 £ remains a dead letter; and though I have repeatedly called attention to it, I have reason to believe that it is never likely to be brought into practical use." J. W. Kaye, *Memorials of Indian Government* (London, 1853), p. 63.

<sup>63</sup> Cameron's evidence, 7 June 1852, *Parl. Papers*, H. L. No. 88 of 1852, Q. 2084.

Law Commissioners, succeeded to the Governor General's Council. On 26 April 1845, the Council forwarded the opinions which had been received in respect of the code to the Commission, and directed it to attend to its revision "or to its final disposal otherwise". Its attention was also drawn to the Seventh Report of the Commissioners on the Criminal Law of England "with a view to comparison and the detection of any omissions or other imperfections that may exist in the code".<sup>64</sup> Cameron and D. Elliott, the only remaining members of the Commission, submitted their first report on 23 July 1846, with a postscript on 5 November, and a second and concluding report on 24 June 1847.<sup>65</sup> On the submission of these reports; they were asked to prepare a scheme of pleading and procedure with forms of indictment adapted to the provisions of the code.<sup>66</sup> This was furnished on 1 February 1848.<sup>67</sup>

Soon after the submission of the first portion of the revised code in 1846, Cameron recommended that it should be extended experimentally to the mofussil areas of the Bombay Presidency at once, because that Government had more than once asked for it. He made this suggestion in view of the opposition met with earlier from other quarters and the fear that the code might be put aside again. The other members of the Council did not agree to the proposal. They wanted the work of revision to be completed, and, after that was done, to extend the revised code to all the Presidencies.<sup>68</sup> Soon after the work was completed, on 4 March 1848, Cameron resigned, and was succeeded by J.E.D. Bethune. The progress of the code was again halted for another two years as the new Fourth Member entertained "very strong objections to the substance of the penal

<sup>64</sup> Letter from the Government of India to the Law Commission, 26 April 1845, Parl. Papers, H. L. No. 263 of 1852, p. 457.

<sup>65</sup> Parl. Papers, H. C. No. 19 of 1847 and No. 330 of 1848. In his minute dated 13 November 1846, Cameron observed that, although he had signed the report, the entire credit for it was due to Elliot only. Parl. Papers, H. L. 263 of 1852, p. 473.

<sup>66</sup> Letter from the Government of India to the Law Commission, 20 March 1847, *ibid.*, 476.

<sup>67</sup> *Ibid.*, p. 501.

<sup>68</sup> Minutes of C. H. Cameron, T. H. Maddock and F. Millett, Parl. Papers, H. L. No. 263 of 1852, pp. 473-5.



code itself, and expressed a doubt whether it could or ought to be passed into law".<sup>69</sup>

The next time when the subject came up before the Governor General's Council was in connection with the three draft Bills which had been designed to place European British subjects within the jurisdiction of the Company's criminal courts. These measures evoked strong opposition, and it was demanded that they should not be enacted until the whole of the criminal law of the mofussil was revised and placed on a sound footing. The Government was obliged to yield and drop the measures, but the event brought home the urgency of placing the code on the statute book. Turning his attention to its progress, Dalhousie expressed great dissatisfaction at the delay in its enactment. He turned down firmly certain alternative suggestions put forward by Colwin, Judge of the Calcutta Supreme Court, and Bethune, and directed his Council to take up the code as revised by the Law Commissioners into consideration immediately. He did not "conceive it probable that a code prepared by men so eminent, judged and approved by so many men of learning and experience, should appear to the Legislative Council so bad in itself, and so incapable of amendment, that they should advise its rejection altogether".<sup>70</sup> Taking note of Bethune's strong objections to it, he observed that they should not be allowed to stand in the way of the Council enacting it with such modifications as it thought fit, and he hoped "that he [Bethune] will

<sup>69</sup> Dalhousie's minute, 19 April 1850, para 16, *ibid.*, p. 506. Also, Bethune's minute, 29 April 1850, *ibid.*, p. 512. Dalhousie wrote to Sir George Couper on 16 April 1850, "My Law Colleague, Bethune, . . . hates the code, and if he can help it, it never will pass." J. G. A. Baird, *Private Letters of the Marquess of Dalhousie* (1911), p. 119.

<sup>70</sup> Minute dated 19 April 1860, Parl. Papers, H. L. No. 263 of 1852, p. 506. Writing to Sir John Hobhouse, President of the Board of Control, on 11 July 1850, Dalhousie observed, "I have all along understood that the Law Commission was appointed for the very reason that the Legislative Council was not sufficient for the task which was in contemplation and for the express purpose of dealing with these deep subjects which the Council would not be expected to fathom . . . . I can see no justification for the Council, if it is to give greater weight to its own incompetent opinion and the opinion of one English lawyer, than to the collective authority of the able men who framed the code originally." British Museum, Add. Mss., 36477, ff. 240-1.

state no objections which he does not sincerely believe it to be his duty to insist upon".<sup>71</sup> "The strong stimulus" administered by the Governor General was necessary, as Bethune admitted, to make him attend "to the business of the code".<sup>72</sup> Bethune and the other members of the Council, Dalhousie being mostly on tour, worked hard for a year from May 1850. The code as revised by them was so different from the original that it gained the appellation "Bethune's Code".<sup>73</sup> Although Dalhousie was most anxious that it should become law as early as possible, he did not consider it proper to treat the sanction accorded in 1848 to the code as revised by Cameron and Elliott to be applicable to its present version. While referring the code again to the Directors, he appealed to them not to permit it "to be laid on the shelf", but send "some definite instructions for the guidance of the Governor General in Council".<sup>74</sup> A reply was received promptly authorising the Council "to proceed to pass a law for giving effect to the code, as it may be finally arranged by you, with the concurrence of Mr. Peacock",<sup>75</sup> who had been appointed to succeed Bethune as the Fourth Member. The code underwent a further revision at the hands of Sir Barnes Peacock and the Select Committee constituted by the new Legislative Council of 1854. Their approach was more favourable to the basic principles which Macaulay had in view.<sup>76</sup> The code was

<sup>71</sup> Minute dated 19 April 1850, Parl. Papers, H. L. No. 263 of 1852, pp. 503-8.

<sup>72</sup> Minute by Bethune, 29 April 1850, *ibid.*, p. 510.

<sup>73</sup> Evidence of F. J. Halliday, Parl. Papers, H. C. No. 426 of 1852-53, Q. 1995-6. Also, evidence of Sir Edward Ryan, H. L. No. 20 of 1852-53, Q. 2359.

<sup>74</sup> Dalhousie's minute, 7 July 1851, Parl. Papers, H. L. No. 263 of 1852, pp. 535-6.

<sup>75</sup> Leg. Letter from Court, 4 February (No. 2) 1852.

<sup>76</sup> The Law Commissioners in England asked what form the penal code would take so that they could formulate the code of procedure accordingly. In the course of its reply, the Select Committee of the Legislative Council on the code observed, "The Penal Code as originally prepared by the Indian Law Commissioners when Mr. Macaulay was the President of that body should form the basis of the system of penal law to be enacted for India." Letter addressed to the Legislative Council, dated 7 July 1854, Papers of Act XLV of 1860, pp. 251-3.

finally passed into law on 6 October 1860, a year after Macaulay's death. The credit for this important piece of legislation should be shared in equal measure by Macaulay who drafted it first and Peacock who revised it and saw it through the Legislature.<sup>77</sup>

*European British Subjects and the Company's Criminal Courts*

The Law Commission submitted another report on a closely allied subject. Frequent complaints had been received from the mofussil authorities about the difficulties experienced in exercising control over European British subjects. One such complaint was in respect of the working of Act IV of 1837. Under this enactment European British subjects were allowed to acquire and hold land or landed interests on the same terms as Indians. But there was no provision for enforcing "the due performance by British subjects, being zamindars or farmers, of the different police duties, which by the custom and previous law of the country could be compelled from native zamindars, farmers and others".<sup>78</sup> Amos put forward a draft Bill to make good the lacuna.<sup>79</sup> The Governor General in Council was satisfied that legislation was required upon the subject. But, at the instance of Cameron, in June 1843, the question was referred to the Law Commission, which was asked to make enquiries in respect of the duties and responsibilities incidental to land tenures.<sup>80</sup> The Commissioners, in their report of 4 November 1843, ignored the main point of reference and viewed it as a part of the general question of bringing

<sup>77</sup> On the part played by these two distinguished personalities, Sir James Stephen wrote, "The long delay in the enactment of the Penal Code had thus the singular but most beneficial result of reserving a work which had been drawn up by the most distinguished author of the day for a minutely careful revision by a professional lawyer, possessed of as great experience and as much technical knowledge as any man of his time. An ideal code ought to be drawn by a Bacon and settled by a Coke." Cited by Sir John Strachey, *India, Its Administration and Progress* (London, 1903), p. 95.

<sup>78</sup> Parl. Papers, H. C. No. 623 of 1844, p. 334.

<sup>79</sup> *Ibid.*, pp. 331-2.

<sup>80</sup> *Ibid.*, pp. 334-5.

European British subjects within the jurisdiction of the Company's Courts in criminal matters. As there appeared to be no likelihood of the penal code being passed into law at an early date, they put forward an interim scheme for the consideration of the Council. Firstly, because European British subjects were greatly averse to being made subject to the Muhammadan penal law, the penalties imposed in their case were to be those "which they would be liable for similar offences committed by them at the Presidencies". Secondly, they were to be subject to the Company's Courts in respect of all offences committed in the mofussil areas, except in the case of capital offences. Thirdly, the trying judge was to be a Justice of the Peace. This ensured that the judge would invariably be a European British subject, as none but a person of this class could be appointed a Justice of the Peace outside the Presidency towns. And lastly, they were to have a right to claim trial with the help of assessors, three in number, one of whom at least was to be a European British subject.<sup>81</sup>

No action was taken on the report for six years. In 1849, Bethune resurrected it in connection with another legislative project, but put forward a totally different plan. He did not agree with the Commission's main recommendation that the English criminal law, as in force in the Presidency towns, should be the law applicable to European British subjects in the mofussil areas. He considered it intolerable that the Company's judges should be asked to master the intricacies of the English criminal law for the sake of a few Englishmen, and felt that what was good for the <sup>the</sup> people of the country in general should be good for them also. <sup>3</sup> Moreover, in his opinion, the criminal law of the mofussil was <sup>7</sup> not in so unsatisfactory a state as was often made out. Therefore, he recommended that European British subjects should be made amenable to the Company's Courts forthwith on the basis of the same law as was applicable to Indians, except in respect of cases requiring capital punishment. To make the <sup>the</sup> obviously unpopular measure acceptable, he recommended the <sup>the</sup> introduction of the jury system, an institution to which Englishmen were greatly attached. Being opposed to racial discrimination of any type, he wanted everyone,

<sup>81</sup> *Ibid.*, pp. 335-46.

not merely European British subjects, to have the right to claim trial by jury, and in framing the panel of jurymen objections on grounds of race, place of domicile or creed were to be invalid.<sup>52</sup>

Bethune's proposals had the support of the whole Council at first and three Bills based on them were published for general information. But the great opposition which the measures evoked from the European community,<sup>53</sup> and the opinions expressed by the judges of the Supreme Court, made Dalhousie change his position. While he still believed that the "present mischievous exemption" should go, he came round to the view that Englishmen should not be deprived of the right to be tried according to their own laws until the penal code became law.<sup>54</sup> As stated earlier, he turned his attention towards expediting that project. The other members of the Council were divided on the issue. J. E. D. Bethune and J. Lowis were strongly opposed to the postponement. But, F. Currie and J. H. Littler saw no harm in waiting for the code, although they did not share the views of the Governor General about the draft measures.<sup>55</sup> Thus, a reform which was considered to be of the utmost urgency by the authorities, both in India and England, in 1833 was again shelved,<sup>56</sup> and the action was approved by the Court of Directors.<sup>57</sup> It may be added that the proposal which led to this enquiry in 1843, but got entwined with more

<sup>52</sup> Bethune's minutes, dated 23 May, 8 June and 23 July 1849, Leg. Dep. Pros., 10 May 1850, Nos. 25 & 27-8.

<sup>53</sup> The intensity of the opposition is reflected in a tract published at the time, entitled "Tyranny in India ! Englishmen robbed of the Blessings of Trial by Jury and English Criminal Law. Christianity insulted", L. J. Trotter, who was not unsympathetic towards the European point of view, wrote, "Against Mr. Bethune himself, as the framer of this new Black Act, the license of abuse soon passed into the shamefullest lengths of sheer slander". *The History of the British Empire in India, 1844-62*, Vol. I (London, 1866), p. 231.

<sup>54</sup> J. G. A. Baird, *Private Letters of the Marquess of Dalhousie* (1911), p. 119. Also, Dalhousie's letter to Sir John Hobhouse, 30 April 1850, British Museum, Add. Mss., 36477, ff. 197-9.

<sup>55</sup> Leg. Dep. Pros., 10 May 1850, Nos. 73-7.

<sup>56</sup> Leg. Letter to Court, 10 May (No. 7) 1850.

<sup>57</sup> Leg. Letter from Court, 27 November (No. 15) 1850.

general and intricate issues, was finally passed into law as Act II of 1853 on the lines of the original suggestions of Amos.<sup>88</sup>

### *Abolition of Slavery*

Next to the penal code, the most important subject of investigation by the Law Commission was slavery. Certain measures had been taken before this time for its regulation and discouragement,<sup>89</sup> but they were much too feeble and hardly touched the core of the problem. The motive force for the proposed abolition was the pressure of British public opinion. The Charter Act of 1833 directed the Government of India to take the subject into consideration "forthwith" and submit annual reports to Parliament as to the progress made. The preoccupations of the Commission with the penal code prevented it from taking up the subject earlier. In spite of repeated reminders from the Court of Directors,<sup>90</sup> an interim report<sup>91</sup> containing evidence was submitted only in 1839 and the final report in 1841.<sup>92</sup>

The Commission commented on the great difference between slavery in India and that in the West Indies and the other colonies. In India the institution was of "a very mild nature".

<sup>88</sup> Leg. Letter to Court, 2 June (No. 11) 1853. Also, Leg. Dep. Pros., 17 September 1852, Nos. 1-6, and 4 February 1853, Nos. 13-22.

<sup>89</sup> A Regulation of Warren Hastings issued in 1774 prohibited the buying and selling of slaves, except in the case of persons who were already slaves by legal purchase. Under a statute of 1807 importation of slaves by sea was prohibited throughout the British Empire. Bengal Regulation X of 1811 and Regulation III of 1832, as construed by the Sadr Court, prohibited importation of slaves into Bengal by land or sea for the purpose of trade. In Bombay and Madras a master was rendered liable to capital punishment for the murder of his slave, and certain restrictions on slaves appearing as witnesses under Muhammadan Law were also removed. Report of the Indian Law Commission on Slavery, 1841, Parl. Papers, H. C. No. 262 of 1841 (Session I), pp. 182-8. See also the account in L. S. S. O'Malley (Ed.), *Modern India and the West* (London, 1941), pp. 71-3.

<sup>90</sup> Leg. Letters from Court, 29 August (No. 14) 1838, 29 July (No. 9) 1840 and 13 October (No. 23) 1841.

<sup>91</sup> Leg. Letter to Court, 4 February (No. 4) 1839.

<sup>92</sup> Parl. Papers, H. C. No. 262 of 1841 (Session I).

Slaves were well-fed and clothed, humanely treated and contented with their lot, and there was no general desire for freedom among them. Indeed in a way, their condition was as good as or better than that of free labourers "in respect of the supply of their physical wants, and particularly of the certainty of that supply".<sup>93</sup> From this analysis of the facts, the Commission came to the unanimous conclusion that the total abolition of slavery in India on the lines followed in the British Colonies would be "an unnecessary and very unpopular interference with the interests, as understood by themselves, both of masters and slaves".<sup>94</sup> All that was necessary was to place the system on a sound footing, with adequate safeguards to prevent oppression and ill-treatment. According to the Commission's recommendations it was to be lawful for any free person of full age to contract to serve for life or for any number of years. Parents or guardians were to have power to apprentice their minor children or wards up to the time they would attain majority. There was to be provision for the registration of these apprenticeship contracts to prevent abuse. While the Commissioners were unanimous in making these recommendations, they were divided on one issue. The majority considered it necessary to vest masters with a moderate power of coercion over their slaves. Without such a provision, they were afraid that the system would not function at all. The minority, on the other hand, felt that a master should be given no more power of correction over his slave than over a free hired labourer. A slave was to be freed if he was ill-treated or subject to any other form of abuse. In the absence of any special power of coercion, the faithful performance of their respective obligations by masters and slaves would largely depend upon their mutual interests and wishes, and the legal condition of slaves would approach much more nearly to pauperism than to what was called slavery in other countries.<sup>95</sup>

When the report came up before the Governor General's Council, the members reacted differently. Only one of the members, W.W. Bird, was in favour of the total abolition of

<sup>93</sup> *Ibid.*, pp. 30 & 188.

<sup>94</sup> *Ibid.*, p. 198.

<sup>95</sup> *Ibid.*, pp. 215-9.

slavery. This was to be achieved, not by making the practice of slavery a penal offence, but by the refusal of the civil and criminal courts of the country to recognise any right arising out of it and by their not making any distinction between a free man and a slave in the enforcement of laws. The other members of the Council were on the whole in favour of recognising the civil obligations arising out of slavery, except that no slave was to be sold in execution of the decree of a court or for the enforcement of any demand of rent or revenue. On the question of vesting masters with special powers of coercion, opinion was sharply divided. Auckland was one with the minority of the Commission and wanted no distinction to be made between a free person and a slave in respect of criminal law. He wanted it to be expressly laid down that "any act which would be a penal offence if done to a free man shall be equally an offence if done to any person in any condition of dependence".<sup>66</sup> But, Amos shared the view of the majority of the Commission that without a moderate power of coercion the recognition of civil rights in respect of slavery would have no meaning. Any reform under these conditions would be tantamount to its total abolition a step to which all the members of the Council except Bird were opposed.<sup>67</sup>

As required by the Charter Act of 1833, the orders of the Court of Directors on the subject were sought. The instructions given on this momentous question by the Directors were advisory rather than mandatory. They expressed their general agreement with the views expressed by Auckland. After stressing the need for great caution and delicacy in handling the subject, they left to the discretion of the Government of India

<sup>66</sup> A proposal to the same effect had been made in Macaulay's Penal Code of 1837, Note B.

Writing to Sir John Hobhouse on 21 March 1841, Lord Auckland observed that he did not agree with either of the parties in the Law Commission. "It seems to me", he wrote, "all attempts to regulate corporal punishment or sales or removals will be steps backwards rather than forwards. We have but to assert that there is no slavery in India, and in a very short time there will be none." British Museum, Add. Mss., 36474, f. 467.

<sup>67</sup> Leg. Dep. Pros., 24 January 1842, Nos. 1-15, 21 March 1842, Nos. 15-17, and 27 May 1842, Nos. 6-11.



“the gradual and simultaneous introduction of these provisions and enactments, in such districts and at such times” as might be considered most favourable “to ensure their ultimate success in the immediate mitigation and final extinction of slavery in India”.<sup>98</sup>

In the light of the opinions expressed by the Court of Directors, the members of the Governor General’s Council were inclined to accept Auckland’s proposals in respect of criminal law and to retain the *status quo* in civil matters. This, according to Amos, destroyed the substance of the institution of slavery, and he saw no purpose in retaining the shadow in the form of civil rights.<sup>99</sup> The measure that was finally passed into law as Act V of 1843, and approved by the Court of Directors,<sup>100</sup> was negative in form. It did not declare the sale or ownership of a slave a penal offence. It merely laid down that a master had no more power of correction over a slave than over a free labourer, that no civil or criminal court in the country should recognise or enforce any right arising out of slavery, and that no public officer should effect the sale of a slave in execution of the decree of a court or for the enforcement of any demand of rent or revenue. The effect of the enactment was, however, far-reaching. It virtually abolished slavery. The institution could survive only to the extent it had the force of custom behind it and the rights derived from it could be enforced with the aid of customary sanctions without in any way violating the penal laws of the country.

There was nothing in Act V of 1843 to prevent possession of child slaves or traffic in them. There was strong opposition in the Council to the banning of the sale of children to slavery, as this generally took place during famines, and parents parted with their children only to save them from certain death. A suggestion that a system of apprenticing with due registration

<sup>98</sup> Leg. Letter from Court, 27 July (No. 11) 1842.

<sup>99</sup> Leg. Dep. Pros., 25 November 1842, Nos. 9-16, and 7 April 1843, Nos. 1-16.

<sup>100</sup> Leg. Letter from Court, 31 January (No. 4) 1844. In his evidence before the Select Committee of Parliament, C. H. Cameron observed, “The legal right of slavery is entirely extinct; but *de facto* slavery is in existence”. Parl. Papers, H. L. No. 88 of 1852, Q. 2118.

before a Magistrate should take the place of such sales was considered to be not feasible administratively.<sup>101</sup> Reform in this field found its completion in the Penal Code of 1860, which made the possession of slaves (including children) and traffic in them penal offences.

### *Lex Loci Report*

The next important subject to which the Law Commission devoted its attention was the codification of the substantive civil laws of the country. This was a highly difficult and complicated task, since they comprised for the most part the personal laws of the different communities. Many experienced administrators warned against any interference with the traditional laws and usages of the people in the name of reform. But the Commissioners would not be deterred by such warnings, and clearly envisaged the codification of the inheritance, marriage and other personal laws of the Hindus and Muslims in due course.<sup>102</sup> The only report they submitted, however, referred to the supply of a serious lacuna in the field of civil law, namely, the absence of a fixed law in the mofussil areas for persons other than Hindus and Muslims. Complaints were frequently made by the Armenians, Anglo-Indians, Indian Christians and Parsis.<sup>103</sup> The Armenians represented that their traditional laws were very vague and uncertain, and they prayed that the benefits of the English law may be extended to them. The Anglo-Indians posed difficult problems to the Company's judges because of their mixed character. The rights of persons converted to Christianity were in a state of uncertainty. The position of the Parsis was highly anomalous, because they were subject to the English common law within the Presidency towns and to their own traditional laws outside them. Commenting on the situation of these communities, the Law Commission observed that while the Presidency towns had a *lex loci* in English law, the mofussil areas had none, and the

<sup>101</sup> Leg. Dep. Pros., 6 January 1843, Nos. 3-5, and 7 April 1843, No. 1.

<sup>102</sup> C. H. Cameron's evidence. Parl. Papers, H. L. No. 88 of 1852, Q. 2048.

<sup>103</sup> Leg. Letter to Court, 20 March (No. 3) 1837, paras 73 & 83-7.

want should be supplied urgently. It submitted a report on the subject on 31 October 1840<sup>104</sup> and also a draft Bill on 22 May 1841.<sup>105</sup> The main recommendations of the Commission<sup>106</sup> were as follows. Firstly, such of the laws of England as were applicable to the conditions of the people of India, and not inconsistent with the Regulations and Acts in force in the country, were to be extended over the whole of British India outside the Presidency towns, and all persons other than Hindus and Muslims were to be subject to them. Secondly, all questions concerning marriage, divorce and adoption concerning persons other than Christians were to be decided by the rules of the sect to which the parties belonged. Lastly, there was to be a College of Justice at each of the Presidencies with the judges of the Supreme and Sadr Courts as members. In all appeals from the decisions of the mofussil courts, the appellate court was to consist of one judge of the Supreme Court, with or without associates. In essence, the Commission's proposal was to make English law the *lex loci* of the mofussil areas as in the case of the Presidency towns.

The progress of the *lex loci* measure was halted by the preoccupations of Lord Auckland with urgent and important matters during 1841.<sup>107</sup> In 1842, the subject came up before the Council when Lord Ellenborough was on tour in the Upper Provinces. There was a sharp difference of opinion as to the course of policy to be pursued between A. Amos and H. T. Prinsep, the latter being highly critical of the Commission's proposals.<sup>108</sup> The President of the Council, W. W. Bird, felt that "it would be dangerous to legislate until opinions were less divided", and the measure was circulated for obtaining the

<sup>104</sup> Parl. Papers, H. C. No. 585 of 1842, p. 439.

<sup>105</sup> Parl. Papers, H. C. No. 300 of 1843, p. 370.

<sup>106</sup> Apart from its basic recommendations, in the words of A. Amos, it was "a comprehensive report giving a history of the judicial systems in the three Presidencies, tracing them through their several modifications to their present state, and presenting a distinct view of all the existing establishments for the administration of civil and criminal justice". Note on the working of the Law Commission, dated 27 January 1843, Leg. Dep. Pros., 7 April 1843, No. 19.

<sup>107</sup> Leg. Dep. Pros., 8 July 1842, No. 19,

<sup>108</sup> *Ibid.*, Nos. 19-21.

views of the Local Governments, Sadr Courts, etc.<sup>109</sup> No further progress was made during the time of Ellenborough 'the state of the country not being favourable during the large portion of the time to the introduction of the measure'.<sup>110</sup> Lord Hardinge attached great importance to its early enactment and caused the publication of the Commission's report, together with the draft Bill, in January 1845 with a view to elicit public opinion.<sup>111</sup> Before the consideration of the subject was resumed, however, the Court of Directors ordered that no law for declaring the *lex loci* of India should be passed without its prior sanction.<sup>1 2</sup> When the subject came up next before the Council, T. H. Maddock pointed out that at the time the Commissioners submitted their first report in 1840 they had intimated their intention to prepare a code or codes of substantive law to be administered under the *lex loci* measure. In the absence of such a code, he held that the measure would introduce into the mofussil areas, "most unnecessarily, a complicated and obtruse form of law, which with our present means it would be difficult if not impossible to administer".<sup>113</sup> In this view, he had the support of the eminent authority of two of the judges of the Supreme Court at Calcutta, Sir Lawrence Peel and Sir H. W. Seton.<sup>114</sup> Hardinge and the rest of his Council, on the other hand, were of the opinion that, even without the proposed code, the measure would be a step forward and would have "the effect of approximating the system in the East India Company's Courts in point of uniformity to those of the Supreme Courts at each Presidency".<sup>115</sup> In view of the directions of the Court

<sup>109</sup> Leg. Letter to Court, 17 March (No. 6) 1843.

<sup>110</sup> Minute by Hardinge, 18 July 1845, Leg. Dep. Pros., 6 September 1846, No. 32.

<sup>111</sup> *Ibid.*

<sup>112</sup> Leg. Letter from Court, 21 May (No. 15) 1845. The Directors' injunction was not based on any official reference, but on a newspaper report of the proposed Bill. Hardinge, however, had no intention to permit the enactment of the measure finally without a reference to the Directors. Parl. Papers, H. L. No. 88 of 1852, Q. 2092-4.

<sup>113</sup> T. H. Maddock's minute of August 1845, Leg. Dep. Pros., 6 September 1846, No. 4.

<sup>114</sup> Letter from Peel and Seton to Hardinge, 25 March 1845, and minute by Peel, 18 July 1845. *Ibid.*, Nos. 32 & 34.

<sup>115</sup> Cameron wrote on 1 August 1845, "The *Lex Loci* Act is approved

of Directors, however, no decision was reached and the papers were transmitted to it for orders.<sup>116</sup> The Directors presumably agreed with Maddock and Peel that a code was essential for the success of the enactment. But there was no one to prepare it, the Law Commission being in a state of semi-dissolution. No instructions were, however, received from the Directors, and the subject lay in cold storage until the second Law Commission attempted next to tackle it.

*Judicial Organisation and Procedure in the Presidency Towns  
and the Straits Settlements*

The Law Commission submitted a number of valuable reports bearing upon judicial organisation and procedure. The first of the reports in respect of the courts in the Presidency towns referred to the administration of criminal justice. A practice had developed in Calcutta by which petty offences were summarily tried and disposed of by Magistrates, although the law required trial by jury before the Supreme Court. This was stopped when its illegality was noticed; but in consequence the Supreme Court was overburdened with work, and the public were also greatly dissatisfied. As Auckland observed, "The impunity of small offences would be more cheerfully borne than the expense and delay of attendance, first upon the Magistrate for committal and secondly, at the Court for trial".<sup>117</sup> Any extension of the system of trial by jury was considered unwise, because great difficulties were being experienced in finding qualified jurymen. On the subject being referred to the Law Commission for investigation and report, it put forward a scheme which was in consonance with its general ideas of judicial reform. It proposed, in place of the Quarter Sessions which were practically defunct, the setting up of a Subordinate

by all the Supreme Courts, by all the Sudder Courts except one (the North West Sudder) and by all the Members of the Government except one—Sir Herbert Maddock." *Ibid.*, No. 35.

<sup>116</sup> Leg. Letters to Court, 5 July (No. 19) 1845 and 6 September (No. 24) 1845.

<sup>117</sup> Minute dated 11 January 1839, Leg. Dep. Pros., 4 February 1839, No. 61.

Criminal Court, presided over by a single judge with three assessors to assist him. The decision was to lie with the judge, but he was to state in his findings the opinion of the assessors. The Court was to have power to sentence to imprisonment up to one year or to fine up to Rs. 1,000.<sup>118</sup> The proposal did not, however, find favour with the Governor General in Council, the employment of assessors and jurymen being marked out for criticism. The immediate requirements would be adequately met, it was considered, by legalising the existing practice of trial by the Justices of the Peace, acting singly, in their magisterial capacity, and Act XXI of 1839 was passed accordingly.<sup>119</sup> Magistrates were empowered under the Act to try persons for simple larceny if the value of the property did not exceed Rs. 20 and sentence them to imprisonment up to six months.

As in the case of the machinery for the disposal of petty crimes, there was also great dissatisfaction with the working of the Courts of Requests, which disposed of small causes in the Presidency towns. In addition to other limitations on their authority, the pecuniary limits of their jurisdiction were low. There was also no uniformity among the Presidencies in the extent of their jurisdiction or in their procedure. Cases which did not fall within their purview went up before the original side of the Supreme Courts.<sup>120</sup> The expense and delay attendant on a suit in the latter amounted to a denial of justice, especially in small causes, and there was great demand for cheaper and quicker dispensation of justice. On the recommendation of Macaulay the question of revising the system was first referred to the Law Commission in 1836.<sup>121</sup> Owing to the pressure upon its time there was considerable delay in the question being taken up. Therefore, under instructions from the Governor General, the Fourth Member, Amos, submitted a

<sup>118</sup> Report of the Indian Law Commission, dated 30 August 1838, *ibid.*, No. 40.

<sup>119</sup> *Ibid.*, Nos. 52-56 & 61. Also, Leg. Letters to Court, 4 February (No. 8) 1839 and 21 October (No. 24) 1839.

<sup>120</sup> W. H. Morley, *The Administration of Justice in British India* (London, 1858), p. 25.

<sup>121</sup> Parl. Papers, H. C. No. 300 of 1843, p. 274.

draft Bill on the subject on 30 June 1841.<sup>122</sup> Instead of immediately taking up the Bill for consideration, the Governor General in Council referred it, along with other papers, to the Law Commission for its opinion.<sup>123</sup> The Commission promptly prepared a draft measure of its own and submitted it on 31 July 1841, with a promise to furnish an explanatory report as early as possible. Unlike Amos's Bill, this measure proposed extensive and fundamental changes in the existing system. The Commission viewed the subject as part of its general scheme of reform, which included the setting up of a College of Justice at each of the three Presidencies. The College was to have on its bench the judges of the Sadr and the Supreme Courts, and its appellate jurisdiction was to extend over the Presidency towns as well as the mofussil areas. A Subordinate Civil Court with unlimited jurisdiction was to take the place of the Calcutta Court of Requests, and an appeal was to lie from it to the College of Justice. The Commission also proposed important procedural changes on which there were strong differences of opinion among eminent jurists and law reformers. These related to administration by the same court of "the rules of law which are called law and the rules of law which are called equity", association of assessors, and oral examination of witnesses.<sup>124</sup>

Being aware that its proposals involved "changes of great importance and technical questions of considerable nicety" which could not be finalised without a reference to the Court of Directors, the Commission put forward in February 1842 a draft Bill for temporarily remedying the inconveniences in the proceedings of the Calcutta Court of Requests. On the basis of the practice which had developed at Bombay, it recommended that a judge of the Supreme Court should hear small causes which did not come within the purview of the Court of Requests and in which the plaintiff's claim did not exceed Rs. 400.<sup>125</sup>

While the consideration of the temporary scheme by the

<sup>122</sup> *Ibid.*, pp. 307-10.

<sup>123</sup> *Ibid.*, p. 314.

<sup>124</sup> *Ibid.*, pp. 324-5.

<sup>125</sup> *Ibid.*, pp. 315-9.

Government was proceeding at a snail's pace,<sup>126</sup> the Commissioners submitted on 15 February 1844 their promised report on the permanent scheme, together with a revised Bill.<sup>127</sup> The recommendations of the Commission were mostly based on Bentham's ideas of judicial reform. The Commissioners were quite aware of the opposition they would have to encounter, as their plan upset the whole pattern of the constitution and procedure of Her Majesty's Courts. They knew that they would have to contend with the fear entertained by the European British community that its cherished institutions were in danger and also with the professional interests of the bar, which wanted to keep judicial procedure as complicated as possible to maintain unimpaired the existing opportunities of obtaining lucrative fees. To make their scheme acceptable the Commissioners made a unique proposal. The Subordinate Civil Court proposed by them was to function with the reformed procedure, while the Supreme Court was to continue with its antiquated forms. Within the limits laid down, both the courts were to have concurrent jurisdiction in civil actions at law, and a suitor was to be free to prosecute his case in whichever Court he liked. They hoped that the reformed procedure would prove its worth by attracting most of the suitors to the new court.<sup>128</sup>

<sup>126</sup> The temporary scheme underwent a marked change at the hands of the Council, and the draft Bill as revised was read for the second time on 23 November 1843. Parl. Papers, H. C. No. 272 of 1845, p. 115. The measure made no further progress.

<sup>127</sup> *Ibid.*, pp. 3-50.

<sup>128</sup> The Commissioners observed, "When these two roads are open at the same time, it will be very instructive to observe what sort of causes are carried by the new road, and what sort by the old. Our own belief is, that in no long time it will become disreputable to sue at law in the Supreme Court. It will soon be understood, that a plaintiff who prefers bringing his action there, is a man who is afraid of being personally examined as to the truth of his case, a man who shuns equity and good conscience, a man who wishes to entangle his adversary in the meshes of written special pleadings, and to have his cause decided upon some point foreign to the merits of it.

"In this state of things, we of course expect that the common-law jurisdiction of the Supreme Court will wither away in the presence of its rival, and that the Legislature will shortly be able to abolish it without exciting alarm or regret." *Ibid.*, p. 5.



The Government of India referred the report of the Commission to the Court of Directors with the remark that it would await "the opinions of the highest authorities on law and jurisprudence at home on this highly technical matter" before expressing its views.<sup>129</sup> The Directors, however, rejected the whole basis on which the Commission had proceeded. They turned down the proposal to set up a new court and directed that any reform should be on the basis of improving the existing tribunals. As regards procedural reforms, they observed that they would be "most happy to see any improvements in Her Majesty's Courts that would tend to simplify their proceedings and diminish the expense of litigation, without impairing their efficiency or introducing principles and rules of practice markedly at variance with those prevailing in Westminster Hall". Further, they warned the Government of India that "fundamental alterations in the administration of English law by English judges should not be suggested without the gravest consideration, and ought never to be carried into effect without the previous sanction of the Home authorities".<sup>130</sup> Thus, another valuable report of the Commission proved fruitless. After further prolonged discussion and correspondence, a modest scheme for setting up a Court of Small Causes at the three Presidency towns was passed into law as Act IX of 1850.<sup>131</sup>

The judicial system of the Straits Settlements was another important subject of enquiry by the Law Commission. This

<sup>129</sup> Leg. Letter to Court, 10 May (No. 11) 1844. Lord Ellenborough felt that the Council "had not time or means to form an opinion upon such a large proposition of law reform", and wanted the matter to be referred to the authorities in England for orders. Evidence by C. H. Cameron, *Parl. Papers, H. L. No. 88 of 1852, Q. 2003*.

<sup>130</sup> Leg. Letter from Court, 21 January (No. 2) 1846. The Law Officers in England, according to C. H. Cameron, were favourably inclined towards the Commissioners' proposals, but the Directors were not agreeable. The discussions ended, he added, "desiring me to take Westminster Hall for my model—which I did not take for my model, certainly; I could not ever be persuaded to do so". *Parl. Papers, H. L. No. 88 of 1852, Q. 2008 & 2073*.

<sup>131</sup> Leg. Letters to Court, 13 March (No. 5) 1847, 6 May (No. 20) 1848, 9 September (No. 26) 1848 and 24 September (No. 15) 1850. Leg. Letters from Court, 20 October (No. 13) 1847 and 31 January (No. 4) 1849.

was occasioned by the Government of India's decision, taken with the approval of the Court of Directors, to abolish the Recorder's Court as a measure of economy.<sup>132</sup> The report of the Commission was submitted on 8 February 1842<sup>133</sup> and covered the entire structure of the judicial system of the Straits Settlements. Further, it raised several important questions of principle and tried to find solutions for them, which, if approved, would have been "guides to the Commission in defining the constitution and procedure of all our courts".<sup>134</sup> The recommendations made in the report had the general approval of 'Ellenborough's Government, except on the subject of procedure'.<sup>135</sup> The Court of Directors too was favourably inclined, but the progress of the measure was protracted mainly on the issue of the form in which its sanction as required by law was to be accorded.<sup>136</sup> While the enactment of the measure was being delayed, the situation greatly altered. In April 1845, the Directors observed that economy was no longer the ruling consideration and the Recorder's Court might be continued with such reforms as were necessary.<sup>137</sup> Further discussions on the subject proceeded on a new basis without direct reference to the Commission's report.<sup>138</sup>

During the fag-end of its career, on 3 July 1845, the Commission also submitted a valuable report on the subject of the remuneration of the officers of Her Majesty's Courts of Judicature,<sup>139</sup> but it was not of much significance from the point of legislation.

### *Judicial Organisation and Procedure of the Mofussil Courts*

The Law Commission presented reports on the following subjects concerning the Company's Courts in the mofussil areas:

<sup>132</sup> Parl. Papers, H. C. No. 300 of 1843, p. 123. <sup>133</sup> *Ibid.*, pp. 135-48.

<sup>134</sup> Minute by Amos, Leg. Dep. Pros., 7 April 1843, No. 19.

<sup>135</sup> Leg. Dep. Pros., 30 December 1842, Nos. 6-11.

<sup>136</sup> Leg. Letter to Court, 30 December (No. 32) 1842 and 11 January (No. 2) 1845. Leg. Letter from Court, 3 May (No. 9) 1843.

<sup>137</sup> Leg. Letter from Court, 30 April (No. 10) 1845.

<sup>138</sup> Leg. Dep. Pros., 25 July 1851, Nos. 1-5, and Leg. Letter to Court, 11 July (No. 11) 1851.

<sup>139</sup> Parl. Papers, H. C. No. 14 of 1847, p. 266.

reorganisation of the Madras judicial system consequent upon the proposed abolition of the Provincial Courts<sup>140</sup>; legal training in India for the Company's civil servants to enable them to serve better in the judicial branch of the service;<sup>141</sup> and assimilation into a uniform system of the offices of the Principal Sadr Amins, Sadr Amins and Munsiffs in the three Presidencies with a view to render them more efficient for the administration of both civil and criminal justice.<sup>142</sup> As regards the first of these subjects concerning the Madras judiciary, the Commission was at first averse to any change being introduced piecemeal, since fundamental and comprehensive reforms in respect of the whole of British India were in contemplation. The Court of Directors, however, pointed out that the abolition of the Provincial Courts had been decided upon as early as 1830 and directed that this measure of reform should not be postponed any longer.<sup>143</sup> The Madras Government also pressed for early legislation on the subject. In view of these pressing demands, the Commission reported on the interim arrangements to be made to give effect to the object within the broad framework of its general schemes, and its recommendations, with certain modifications, formed the substance of Act VII of 1843. The reports of the Commission on the last two subjects were useful documents, containing a clear picture of the structure of the Company's Courts in the three Presidencies, but their recommendations do not appear to have had any immediate effect on the course of legislation.

As regards judicial procedure, the most important and fruitful of the Commission's reports referred to special appeals to the Sadr Courts. Under the system in force, there was no

<sup>140</sup> Two reports dated 2 August 1840 and 10 July 1841, Parl. Papers, H. C. No. 585 of 1842, pp. 323 & 550.

<sup>141</sup> Report dated 2 July 1842. Parl. Papers, H. C. No. 300 of 1843, p. 485.

<sup>142</sup> Report dated 17 May 1843, Parl. Papers, H. C. 623 of 1844, p. 151. There is no evidence of a Civil Procedure Code having been prepared by the Commissioners, as stated by Whitley Stokes. In this connection, see Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), p. 259.

<sup>143</sup> Leg. Letter from Court, 20 January (No. 2) 1841. Also, Letter from the President in Council to the Governor General on tour giving a full history of the case. Leg. Dep. Pros., 24 February 1843, No. 29.

guarantee that the interpretations of laws applied by the Company's Courts, would be uniform and consistent. In the Presidency of Bengal, for instance, there were two independent Sadr Courts, one at Calcutta and the other at Allahabad. Their rulings and decisions, however divergent, were final within their respective jurisdictions, subject to the revision of the Privy Council. To avoid widely divergent decisions, a practice of referring disputed points of law to the Governor General in Council for orders had developed. But this was admittedly wrong in principle and had possibilities of grave abuse. Further, in a number of cases, the District Judge was the final court of appeal even where the dispute was on a point of law. The result was that each District was tending to have "a law and a practice not a little differing from those of its neighbours". To overcome this defect, the District Judges were required to consult the Sadr Courts on doubtful points of law, and circular orders were issued containing their rulings given upon such references. This practice was unhealthy as the rulings were given extra-judicially, often on hypothetical cases.<sup>144</sup> On a reference made to it, the Law Commission submitted a report on 4 December 1841, which formed the basis of Act III of 1843.<sup>145</sup> The principle underlying the measure was that a special appeal should be allowed to the Sadr Courts in all the three Presidencies from the decisions of the subordinate civil courts, whenever they appeared "to be inconsistent with some law, or usage having the force of law, or some practice of the courts, or involve some question of law, usage or practice, upon which there may be reasonable doubts".<sup>146</sup>

Of the other reports of the Commission, each of them of importance in a small way, may be mentioned the following: (i) With reference to a proposal from the Government of Madras that Muhammadan criminal law should no longer be

<sup>144</sup> Letter from the Offg. Secretary to the Government of India to the Secretary to the Government of India with the Governor General, 16 December 1842.—Parl. Papers, H. C. No. 623 of 1844, p. 279. See also Leg. Letters to Court, 17 August (No. 17) 1840, paras. 12-9, and 14 September (No. 18) 1843, paras 26-43.

<sup>145</sup> Parl. Papers, H. C. No. 585 of 1842, pp. 633-8.

<sup>146</sup> Preamble to Act III of 1843.

recognised, the Commission, in its report of 30 May 1837, observed that no change should be effected pending the enactment of the penal code. It was, however, of the view that the system of calling for the *fatwa* or the opinion of the Muslim law officer might be dispensed with in the Sadr Faujdari Court of the Presidency as had been done in Bengal. The change was effected by Act I of 1840.<sup>147</sup> (ii) A short report on the subject of enforcement of fines, dated 2 March 1838, was accepted, and its recommendations were embodied in Act II of 1839.<sup>148</sup> (iii) On 18 November 1839, the Commission submitted a report concerning oaths and declarations by Indian witnesses.<sup>149</sup> The occasion for the report was the receipt of repeated complaints that Hindus and Muhammadans avoided appearing as witnesses, because of their aversion to take oaths by holding the water of the *Ganges* and the *Koran* respectively in their hands, and the course of justice was impeded thereby.<sup>150</sup> The Commission favoured having one rule for all persons, and it recommended the adoption of solemn affirmation "in the presence of almighty God" in the case of believers and simple affirmation in the case of conscientious objectors. When the subject came up before the Governor General in Council, there was opposition to the proposal in so far as the Europeans were concerned. Amos expressed the view that it would affect the credibility of European witnesses, and Auckland was averse to such "an extreme departure from what has yet been admitted in English jurisprudence".<sup>151</sup> The Commission's proposal was, therefore, accepted only in respect of the Hindus and Muhammadans, and Act V of 1840 was passed to give effect to it. (iv) The difficulties in the way of the mofussil courts in obtaining the evidence of persons resident in Calcutta led to a scrutiny of the rules for the examination of absent witnesses in

<sup>147</sup> Parl. Papers, H. C. No. 585 of 1842, pp. 3-18.

<sup>148</sup> *Ibid.*, pp. 192-208.

<sup>149</sup> *Ibid.*, pp. 257-60.

<sup>150</sup> Some persons, however, testified that the opposition to the administration of these oaths originated in what was commonly called the anti-idolatory movement. Parl. Papers, H. L. No. 20 of 1852-53, Q. 3138; 4480 & 4532.

<sup>151</sup> Parl. Papers, H. C. No. 585 of 1842, pp. 260-5.

general. A brief report was submitted by the Commission on 22 May 1841 proposing a uniform and improved process for all the courts throughout British India and its recommendations were embodied in Act VII of 1841.<sup>162</sup> (v) The Commission submitted a report on 1 September 1842 on land sales by the revenue authorities in execution of the decrees of the civil courts in the Presidency of Bengal. It recommended the transfer of the function to the judicial authorities as in Bombay and Madras.<sup>163</sup> In view of the opposition of the Government of the North-Western Provinces, the recommendation was given effect to by Act IV of 1846 only in respect of the Lower Provinces.<sup>164</sup>

### *Miscellaneous Reports of the Commission*

Of the reports submitted by the Law Commission upon other matters, there was firstly the one on prescription and limitation. Prior to 1859, apart from the rules in force in Oudh and the Punjab there were four different systems of limitation law in British India.<sup>165</sup> On 23 March 1841, Amos put forward a measure to modify and consolidate the law respecting limitation of suits as administered by the Company's Courts in all the three Presidencies, and also to introduce in respect of the Supreme Courts certain changes lately introduced into the English statute law on the subject. He thought that the time was not yet ripe to make the law uniform as between the Presidency towns and the mofussil areas, because the judges of the Calcutta Supreme Court had expressed the opinion that this could not be done without very extensive alterations in the substantive law as administered by the Supreme Courts.<sup>166</sup> On the subject being referred to the Law Commissioners, they submitted on 26 February 1842 a valuable report, with their own draft Bill for the acquisition and extinction of rights by prescription and for the limitation of suits in all the Company's

<sup>162</sup> *Ibid.*, pp. 516-32.

<sup>163</sup> Parl. Papers, H. C. No. 300 of 1843, pp. 472-81.

<sup>164</sup> Leg. Letter to Court, 31 October (No. 28) 1846, paras 15-25.

<sup>165</sup> W. Stokes, *Anglo-Indian Codes* (Oxford, 1888), Vol. II, p. 943.

<sup>166</sup> Leg. Letter to Court, 29 November (No. 23) 1841, paras 40-8.

Courts. They also recommended that the opportunity should not be missed to assimilate the laws in force in the Presidency towns as well.<sup>157</sup> On a reference being made to all the Supreme Courts, a majority of the judges expressed their concurrence. Thereupon, the Commissioners submitted a revised draft on 1 October 1842, and also two further reports during the same year in reply to certain objections which had been advanced against their proposals.<sup>158</sup> These papers were circulated in 1843 to the Local Governments and the judges of the Supreme Courts,<sup>159</sup> and strong differences of opinion arose on the issue of positive prescription. The measure made no further progress until 1859, when J. W. Colville introduced a Bill, not materially different from the one proposed by the Law Commission, in the Legislative Council. The question of positive prescription again loomed large. It was, therefore, decided to drop this controversial issue and pass the remaining portion of the Bill into law. This was done by Act XIV of 1859.<sup>160</sup>

Another subject that came up before the Commission referred to the stamp laws, which were in a state of confusion. There were great variations in the laws among the three Presidencies. Much more objectionable were the differences in the law in force as between the mofussil areas and the Presidency towns. For instance, while payment of the stamp duties was obligatory in the mofussil areas of Bengal, the use of stamps was in practice optional in Calcutta, since unstamped instruments were admissible as evidence in the Supreme Court.<sup>161</sup> Soon after the Law Commission was constituted, it was asked to prepare in consultation with the Board of Customs, a draft Bill for amending and consolidating the stamp laws of the Bengal Presidency, and also consider the question of having a uniform stamp law for all the three Presidencies. The report of the Commission, submitted on 21 February 1837, and the

<sup>157</sup> Parl. Papers, H. C. No. 300 of 1843, pp. 20-32,

<sup>158</sup> Parl. Papers, H. C. No. 623 of 1844, pp. 15-23.

<sup>159</sup> Leg. Letters to Court, 13 May (No. 11) 1843 and 11 November (No. 20) 1843.

<sup>160</sup> Papers of Act XIV of 1859.

<sup>161</sup> Note by J. P. Grant, Deputy Secretary to Government, General Department, 5 October 1838—Parl. Papers, H. C. No. 623 of 1844, p. 587.

draft Bill accompanying it covered both general and judicial stamps. The Bombay and Madras Governments were not in favour of a general law in view of the many local peculiarities and problems.<sup>103</sup> The measure made no progress even in respect of Bengal. It was not till 1860 that a comprehensive law applicable to the whole of British India was passed.<sup>103</sup>

Finally, under instructions from the Government, the Law Commission submitted a report in 1844<sup>104</sup> concerning the binding of apprentices. The main object was to enable European and Anglo-Indian children, 'particularly orphans and destitute children maintained by public charities', to have training "in arts, trades crafts, and employments", which would enable them to make a living when they came of age.<sup>105</sup> The draft Bill accompanying the report was framed in general terms "to avoid as much as possible the appearance of class legislation", but its operation was to be limited in practice to the object in view.<sup>106</sup> The report met with adverse reception from the masters and traders of Calcutta. They considered the proposals too lenient towards the apprentices and desired that masters should be vested with a moderate power to chastise their wards. After protracted negotiations and deliberations concessions were made to meet this demand, and Act XIX of 1850 was passed implementing the report of the Commissioners.<sup>107</sup>

### *General Assessment of the Work of the Commission*

From our study so far, it is apparent that great difficulties were experienced in implementing the reports of the Law Commission, and most of its important schemes failed to find their way into the statute book. Macaulay's penal code was "to daring and original to be accepted at once".<sup>108</sup> The schemes for the

<sup>103</sup> *Ibid.*

<sup>105</sup> Papers of Act XXXVI of 1860. Also, Bethune's minute dated 9 May 1848. Leg. Dep. Pros., 26 August 1848, No. 6.

<sup>104</sup> Parl. Papers, H. C. No. 272 of 1845, pp. 151-61.

<sup>105</sup> *Ibid.*, p. 157.

<sup>106</sup> *Ibid.*, p. 155.

<sup>107</sup> Leg. Letter to Court, 6 December (No. 19) 1850.

<sup>108</sup> See p. 182 above.



setting up of Subordinate Civil and Criminal Courts at the Presidency towns and the scheme for the abolition of the Recorder's Court and the reform of the judiciary in the Straits Settlements were, on the procedural side, too much at variance with the laws in force in England, and they naturally met with considerable opposition from conservative elements in both the countries. The proposal to bring European British subjects within the jurisdiction of the Company's criminal courts failed, because of the opposition of that community. The *Lex Loci* Report had the good fortune of meeting with the support of both the Law Commission and the Government of India, but it was not acceptable to the Court of Directors. It is perhaps for the good that this report was not adopted, since the Commissioners had tried to find too short a cut for solving this vexed question.<sup>169</sup> The recommendations of the Commission regarding the law of limitations would not have been put in cold storage if the subject had been disconnected from that of prescription at the outset. The only report of importance to be implemented without delay was that in respect of slavery. The promptness in this case must be attributed largely to the pressure of public opinion in England.<sup>170</sup> The other reports of the Commission which were adopted and translated into laws without much delay referred mostly to the organisation and procedure of the Company's Courts, but the record in this field was not very impressive. The labours of the Commission did not, on the whole, lead to the enactment of "any very large number of substantial Acts" which might have impressed contemporaries, and the Commission "left behind it only an impression that it was a failure. as costly as it was complete".<sup>171</sup>

<sup>169</sup> Sir G. C. Rankin writes, "Two false steps were taken by the Commission and had to be retraced—proposals that the Hindu and Mahomedan laws should be codified and that the law of England should be made the *lex loci* throughout British India." *Background to Indian Law* (Cambridge, 1946), p. 21.

<sup>170</sup> Advising the Government of India to take urgent steps, Lord Ellenborough, who was the President of the Board of Control, warned that the Home authorities might legislate blindly upon the subject if they were not forestalled by action in India. A. H. Imlah, *Lord Ellenborough* (Manchester, 1939), p. 191.

<sup>171</sup> J. W. Kaye, *The Administration of the East India Company* (London,

From the historical point of view, however, the Commission did serve a very useful purpose. The work of judicial and legal reform had been undertaken for the first time on an extensive scale and in a systematic manner in respect of the whole of British India. As John Austin pointed out long ago, the technical part of legislation is infinitely more difficult than the ethical.<sup>172</sup> Controversies and conflicts were bound to arise, and the progress made was likely to be much slower than envisaged in the first flush of reformist enthusiasm. No doubt, in the present case, the achievement in concrete terms was much less than warranted by the circumstances of the country. The Commission, however, rendered signal service in collecting valuable information on a variety of subjects and analysing the issues involved in a comprehensive and thorough-going manner. Its work brought to the surface questions over which opinion was sharply divided and set people thinking about them, and this was the first step towards finding firm and generally acceptable solutions for them. The very failures of the Commission were useful stepping stones for the great success achieved in the field of judicial and legal reform during the subsequent decades. This apart, in a more concrete sense, the Indian Penal Code of 1860 stands out as a prominent symbol of the Commission's labours having been not wholly in vain.

### *Reasons for the Failure of the Commission*

At the time of the passing of the Charter Act of 1833, as stated earlier, the proposals for the codification of laws and 1853), pp. 106-7. There is a certain similarity between the history of the English Law Commissions and the one that sat in India during the period. Regarding the former, Courtenay Ilbert wrote, "Their reports are full of learning, and contain many valuable suggestions, some of which have borne useful fruit. But in course of time considerable dissatisfaction was expressed, both in Parliament and in public, with the nature of their work, and with their rate of progress. It was complained that they wrote too much, cost too much, and did too little' or, at all events, that the tangible results of their work were really small. And so they came to an end." *The Mechanics of Law Making* (New York, 1914), p. 30.

<sup>172</sup> Referred to by C. Ilbert, *ibid.* p. 98.

legislative reform had a large measure of support, both in India and in England, and opposition to them was weak and subdued. Once the broad principles were accepted and concrete steps to implement them had to be taken, strong differences of opinion arose over the solution of specific problems even among the supporters of reform, and this was an opportune time for the conservative elements to reassert themselves. The Utilitarian ideas of judicial and legal reform, so pronounced in the Charter discussions, faced continuous attack from the older paternalist school of Malcolm, Munro and Elphinstone. As Eric Stokes has observed, "The resistance which liberalism encountered in India was not the ordinary inertia of the existing order. It encountered what in a more intellectualized political tradition would be called a rival political philosophy. It encountered the spirit of Burke. The Liberal attempt to assimilate, to anglicize, was met by a generation of administrators, founded by Sir Thomas Munro, who possessed all Burke's horror at the wanton uprooting on speculative principles of an immemorial system of society, and shared all his emotional kinship with the spirit of feudalism and the heritage of the past."<sup>172</sup> Save for a few brilliant individuals like Holt Mackenzie, Alexander Ross and Charles Trevelyan, the Company's servants belonged as a class to this group. They offered effective opposition to each one of the reform schemes proposed by the Law Commission, whenever they sensed anything novel or doctrinaire. Opposition came from other quarters too. The judges and the bars of the Supreme Courts were highly critical of the schemes for the reform of the English law as in force in India, and they had a strong case since the proposals were generally much in advance of what was considered practicable in England.<sup>174</sup> The European British subjects put up a stout

<sup>172</sup> Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), p. xvi.

<sup>174</sup> Writing in connection with the draft penal code in 1846, Cameron observed that Bombay was "a partial exception to the general resistance which the judges of the Supreme Court have felt it their duty to offer to the innovations of the Law Commission". When he first came to India he was greatly impressed with the possibilities of making the Presidency towns the first fields of experimentation. "But having been foiled in

resistance to measures which were designed to bring them within the jurisdiction of the Company's Courts. Since they were quite vocal and highly influential, the Commission's reports affecting them made the least progress.

The general charge against the Commissioners was that they were visionary, doctrinaire and impractical. This was no doubt true to no small extent. When they sought to realise Bentham's ideal of "pannomium" or a body of codes covering the whole field of jurisprudence, including the civil laws of the Hindus and Muhammadans, they were visionaries. When they based their laws on philosophic insight and *a priori* reasoning and not on a comparative study of the legal systems of the world, they were doctrinaire. When they hoped to reach their cherished goal in a decade or so,<sup>175</sup> they were thoroughly impractical. In the early years following the enactment of the Charter Act of 1833, there was very insufficient realisation of the immensity and complexity of the task that had been undertaken. There had been only a few minor experiments in codification in the past, both in India and elsewhere, to serve as guides, and the first Indian Law Commission was more or less a pioneer in the field. The country had yet to learn that success in legislation depended less upon knowledge of the philosophy of law and skill in draftsmanship and more upon ability to reconcile conflicting interests and on doing nothing to rouse deep-rooted sentiments of considerable bodies of persons, and that reform is "a never-ending process of piecemeal adjustment instead of a few swift strokes ushering in a fresh golden age".<sup>176</sup>

In spite of these shortcomings, arising out of immaturity and inexperience, a good measure of success by way of substantial legislation might have been achieved if there had been

every attempt to make progress in this direction," he wrote, "I am now disposed to recommend that every improvement which we desire to introduce into India should be introduced into the mofussil." Parl. Papers, H. L. No. 263 of 1852, pp. 473-4,

<sup>175</sup> See pp. 177-8 above. Macaulay hoped that the code of civil rights, "the most difficult and important part of the business of the Law Commission", would be completed by 1850. Leg. Dep. Pros., 3 April 1837, No. 26.

<sup>176</sup> Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), p. 224.

better understanding between the Commission and the Governor General's Council, and also the authorities in England had taken more kindly than they did to ideas of reform. Throughout the history of the period, we notice a continuous conflict between the conservative and the radical, the practical and the philosophic, views in Government circles. The Charter Act of 1833 had indeed, just posed the problem of judicial and legal reform rather than solved it; the battle for reform had begun rather than ended. At the very commencement of the period, while the language of the Charter Act signified the high-watermark of reformist enthusiasm, the Court of Directors, in their well-known instructions of 1834, laid stress on the need for caution and gradual building up.<sup>177</sup> This remarkable document, drafted by James Mill, reflects no doubt Benthamite ideas;<sup>178</sup> but it reflects no less the doubts and fears of his masters, concerning the new-fangled schemes of reform. Again, while Macaulay and Cameron, both of them eminent Benthamites, set out to India to help in the work of law reform, Lord Ellenborough, President of the Board of Control at the time, issued a stern warning to Cameron against imposing his radical ideas upon India.<sup>179</sup> The conflict between the

<sup>177</sup> Public Letter from Court, 10 December (No. 44) 1834, paras 4-5. J. W. Kaye sized up the position correctly when he wrote that the ablest members of the Court doubted the wisdom of the centralisation of the legislative power and the project of codification, but they bowed to the behests of Parliament and exhorted the Government of India to carry out its intentions. *The Administration of the East India Company* (London, 1853), p. 103.

<sup>178</sup> Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), pp. 193-6.

<sup>179</sup> In his letter of 23 January 1835 to Cameron, Lord Ellenborough wrote plainly and firmly, "Whatever may be the ignorant haste of philosophers in England to see from day to day some great alteration in the laws and administration of India, and whatever may be your desire to prove that you have been a zealous and an industrious investigator, I feel confident that you must have too deep a sense of the responsibility with which you are invested, having practically in your hands the future happiness of the great people, and the future security of a vast empire, not to pause long and anxiously before you recommend any material change. There may be as much boldness, and as much wisdom, and as much real service, in resolving to do nothing as in the most extensive and glittering revolution." Parl. Papers, H. L. No. 88 of 1852, Q. 2046.

two points of view is first seen clearly in India in the discussions which preceded the Government of India's decision to start the work of codification with the penal laws of the country. On this occasion, while Macaulay was able to dominate and have his way, a strong voice of protest was raised by H.T. Prinsep. He held that codification was a distant goal to be reached gradually by stages, and not something to be ventured upon immediately.<sup>180</sup> Commenting upon this controversy, the Court of Directors expressed its concern at the Council not paying sufficient attention to his view, and hoped that "the course of proceeding recommended by Mr. Prinsep must substantially have been pursued by the Law Commissioners".<sup>181</sup> The same spirit of hostility runs through Prinsep's minutes on other allied subjects also. After the departure of Macaulay the opposition to his policy of preparing general codes increased rapidly.<sup>182</sup> It was held that this involved a radical, often unnecessary and dangerous, interference with the existing system, and that legislative intervention should be confined to remedying known evils which required urgent attention. Andrew Amos, who succeeded Macaulay, had little sympathy with his predecessor's views, and in 1838 we find Auckland warning him not to press his opposition too far.<sup>183</sup>

<sup>180</sup> Holders of the proposed instructions to the Law Commission were contrary to the intentions of the statute, Prinsep observed, "I do not find any provision for their [the Commissioners'] being employed at once in framing a code antecedent to all enquiry and report. I gather from the tenour of Liird and the Livth Sections of the Act that it was the intention of the British Legislature to proceed cautiously, and build up by the improvement of existing laws and institutions, a more perfect structure than we now possess. I look upon it as contrary to the spirit or the letter of the law, that the whole of what is now in existence should first be laid prostrate in the idea that a new system theoretically perfect can readily and with ease be established." Minute dated 11 June 1835, Judicial (Criminal) Proceedings, 15 June 1835, No. 2. Also, *ibid.*, Nos. 1 & 3.

<sup>181</sup> Leg. Letter from Court, 1 March (No. 4) 1837.

<sup>182</sup> See pp. 179-80 above.

<sup>183</sup> Auckland wrote on 17 September 1838, "Mr. Macaulay's view of the course of legislation which might at present best be pursued in India was in favour of maturing great measures of amendment rather than of applying corrections to every inconvenience or defect as it might be brought to the notice of the Legislative Council. Mr. Amos seems to

Again, a little later in the time of Auckland, the Commissioners were asked to let the Government know in advance, prior to the submission of their formal reports, what recommendations they intended to make. This was viewed as an attempt "to stifle the voice of the Law Commission when it happened to differ in opinion from the Supreme Council", and the Commissioners refused to accede to the request, which they deemed unconstitutional.<sup>181</sup> The conflict between the two schools of thought next blazed forth into white heat and was seen in clear perspective in the discussions preceding the winding up of the Law Commission in 1843. Except for Cameron, there was none left in Ellenborough's Council to defend the course of policy laid down in 1835 on the initiative of Macaulay. Ellenborough, Bird, Maddock and Casement made their opposition to the whole idea of preparing general codes quite clear, and they wanted the Commission to be abolished forthwith.<sup>185</sup>

have a more anxious desire to meet the immediate demands of the public by more frequently applying the remedy of a New Law. The question here as in the majority of differences is one of degree, and with the prospect of but slow progress in the formulation and adoption of New Codes, I am not otherwise than inclined to support, within due limits, the views of Mr. Amos, and particularly so, if they should be carried into effect in harmony with the more general objects of the Law Commission and in a great degree, therefore, in connection and consultation with that body." *Leg. Dep. Pros.*, 8 October 1838, No. 22.

<sup>181</sup> Evidence of C. H. Cameron, 7 June 1852, *Parl. Papers*, H. L. No. 88 of 1852, Q. 2083. Cameron further stated that immediately after this incident Amos was put into the Commission as President. But this does not appear to have been the main motive. See pp. 173-4 above.

<sup>185</sup> Ellenborough wrote that the Commission had become a "standing committee of change", and the tendency of this body and of the office of the Fourth Member was "to alter as much as possible in a country in which it is most desirable to leave the long agitated minds of the people at rest and satisfy them that under the British Government something can be permanent".—Ellenborough's *Leg. Letter to Court*, 22 April 1843. Bird stated that he had faith at no time in the object for which the Commission had been established. Maddock observed, "We are still comparatively strangers in India, and till we have attained a far better knowledge of the people than we yet possess it will be more prudent to confine our legislation to matters as they arise which call for the immediate attention of the Government, whether to meet particular wants, to correct abuses, or to amend defects in the existing law, than for the sake

Amos, the retiring Fourth Member, was equally critical, though less forthright. He wanted the Commission to stop thinking in terms of comprehensive surveys and comprehensive remedies, but "to frame succinct schemes of such general improvement as the Commission felt disposed to recommend", to ascertain how far the Government was willing to adopt them, and then to "complete the details according to the modifications of principle which that Government might make".<sup>186</sup> Cameron was alone in his view that Parliament's decision to give the country general codes was a wise one and that the Commission should proceed on the same lines as before. He wanted, however, the relations between the Commission and the Governor General's Council to be improved to ensure that its work did not go waste.<sup>187</sup> The Court of Directors agreed with the majority of Ellenborough's Council and decided upon *taking steps for the abolition of the Commission.*

In this conflict of ideologies, generally speaking, it is seen that the Commission represented the reformist, and the Governor General's Council the conservative, point of view, and it appears that the failure of the Commission must be attributed mostly to this divergence in outlook. During the life of the Commission, the discordance was at its minimum till 1838. In the years that followed the Council was dominated by men who had no faith in the objectives in view when the Commission was set up.<sup>188</sup>

It might appear at first that the divergence in outlook between the Council and the Commission was due only to the accidental composition of the two bodies and the personal attitudes and views of the members. Further reflection would, however, show that there were other forces at work. The Law

of uniformity or the introduction of a system to impose upon the people of all India elaborate codes of universal laws which few would understand, which many would deem unjust, and which none would regard with respect and veneration that they have been used to pay to the current laws and usages of their country." Pol. Dep. Pros., 10 May 1843, Nos. 1-3. Also, Leg. Dep. Pros., 23 December 1843, Nos. 3-5.

<sup>186</sup> Leg. Dep. Pros., 7 April 1843, No. 18.

<sup>187</sup> Leg. Dep. Pros., 7 April 1843, No. 20, and 23 December 1843, No. 1.

<sup>188</sup> See p. 179 above.



Commission, it should be noted, was not packed with philosophers or persons wedded to reform. It consisted for the most part of hard-boiled administrators, seasoned in the service of the Company. The recommendations of the Commission were mostly unanimous, and there was little evidence of ideological conflicts among its members. In the light of these facts, it would be quite wrong to say that a group of radical reformers and visionaries in the form of the Commission found itself ranged against a body of practical administrators who constituted the Governor General's Council; the conflict was really between two sets of administrators holding different offices. The true explanation for the difference in their outlooks lies more in the nature of the duties they were respectively called upon to perform than upon any other factor. Parliament had directed the Law Commissioners to make thorough-going enquiries and suggest comprehensive remedies. They owed a duty to Parliament apart from what they owed to the Government of India. They were engaged wholly upon matters pertaining to legislation, and they had ample time for study and reflection. Their enquiries made them more keenly aware of the shortcomings of the existing system than anyone else, while their work brought them into close and intimate contact with the progressive ideas of legal reform which were current in England. Placed as they were, they developed a much broader outlook than their colleagues engaged in the routine of administration. The members of the Governor General's Council, who were to accept and implement the recommendations of the Law Commission, on the other hand, were preoccupied with political and military affairs and had little time left for the work of legislation.<sup>189</sup> They did not have the extensive background in

<sup>189</sup> Evidence tendered before the Select Committee of Parliament—Frederick Millett (Parl. Papers, H. L. No. 20 of 1852-53, Q. 2338-9), H. Maddock (H. L. No. 88 of 1852, Q. 744 & 860-1), J. M. Macleod (*ibid*, Q. 2824), C. H. Cameron (*ibid*, Q. 1999), and David Hill (H. C. No. 426 of 1852-53, Q. 1454). Also see the opinions of Lord Dalhousie and Sir Barnes Peacock in note on p. 73 above.

It has been usual to attribute the failure of the Commission to the Government's preoccupation from 1838 onwards for nearly two decades with wars and foreign affairs. Eric Stokes, *The English Utilitarians and*

respect of legislative reform which the Commissioners acquired, and their outlook was limited. They did not take kindly to changes which appeared novel, particularly to those which were controversial, and they were not impressed to the same extent as the Commissioners were by the need for uniformity, system and order. Where they disagreed with the Commissioners, they were not bold enough to overrule them summarily and act according to their own lights, because the Commission enjoyed a statutory status and its reports went up to Parliament. They had no time to evolve alternative schemes of reform on their own and gather sufficient support to justify their enactment. As a result, they allowed matters to drift: measures which were not wanted were circulated for eliciting opinion and got lost in the maze of discussions and references.

Thus, in the ultimate analysis, the fault lay not so much with the men or the political conditions of the time as with the system. The body empowered to prepare great schemes of reform had no voice in actual legislation; the one vested with the supreme legislative authority had no time or aptitude to digest the schemes which were submitted to it and reach firm decisions. The thinking and the willing parts of the legislative organism were very much out of joint.<sup>190</sup>

The attitude of the Court of Directors, especially after the

*India* (Oxford, 1959), pp. 190 & 240, and G. C. Rankin, *Background to Indian Law* (Cambridge, 1946), p. 21. While this was no doubt an important factor, the principal cause for the Commission's failure appears to have been the divergence of its outlook from that of the Council. W. W. Bird, a member of Ellenborough's Council, rightly observed that the real reason for the slow and unsatisfactory progress was the existence of "great differences of opinion on points involving most important interests". *Pol. Dep. Pros.*, 10 May 1843, No. 1. Again, replying to a question whether the failure of the Commission was due to want of time and aptitude on the part of the Council, F. J. Halliday observed, "Not wholly from want of time and aptitude, but from want harmony between the body who framed the laws, and the body who were to pass them, involving no doubt some want of aptitude and some want of time." *Parl. Papers*, H. C. No. 426 of 1852-53, Q. 2030.

<sup>190</sup> For a good analysis of what happened, see the evidence of F. J. Halliday, *Parl. Papers*, H. C. No. 426 of 1852-53, Q. 1941, and H. L. No. 20 of 1852-53, Q. 3467. See also evidence of David Hill, *Parl. Papers*, H. L. No. 20 of 1852-53, Q. 2201-2.

death of James Mill in 1836, hardly helped to improve matters. This body had no faith in the project of codification from the very beginning and did not in general approve of the manner in which the Commission worked. When measures were referred to it for orders, it turned them down or sat over them. Where it did neither, it failed to give a firm lead. The Whig Government which had set up the Commission did not also remain in office long enough, in the words of C. H. Cameron, "to give the Indian Law Commission that support which Tribonian and his colleagues received throughout their labours from Emperor Justinian. and which Cambaceres and his colleagues received in like manner from Emperor Napoleon".<sup>191</sup>

### *Winding up of the Commission*

Right till the middle of Lord Auckland's regime, the Commission's stock may be said to have remained high. Thereafter, there was growing dissatisfaction with the general tenor of its schemes, the manner of its proceedings, and the slow progress in its work.<sup>192</sup> The question of its abolition first came up for consideration in 1842 in connection with economy in public expenditure. On this occasion, while leaving the decision to the authorities in England, Auckland paid a warm tribute to the work of the Commission which he viewed as an "adjunct to Government attended with much advantage". He hoped that if it was decided to abolish it, the step would not be taken abruptly.<sup>193</sup> But his views were certainly not shared by his

<sup>191</sup> C. H. Cameron, *An Address to Parliament* (London, 1853), p. 5. Also, evidence of J. M. Macleod, Parl. Papers, H. L. No. 88 of 1852, Q. 2812.

<sup>192</sup> In his minute dated 9 June 1839, T. C. Robertson, a member of Auckland's Council, drew attention to the delay in the submission of the report on slavery by the Law Commission and the holding up of the work on other subjects. He proposed "that some period may be fixed beyond which the Law Commission may be requested not to continue the inquiries or deliberations on an exclusive topic". Parl. Papers, H. C. No. 14 of 1847, p. 172.

<sup>193</sup> Minute dated 28 February 1842, Financial Department, Original Consultation, 23 March 1842, No. 2.

colleagues—H. T. Prinsep, Macaulay's inveterate antagonist again in the Council, and W. W. Bird, and even A. Amos. When the Court of Directors sought to ascertain the opinion of the Council on the specific question of the abolition of the Commission, there was none to support the continuance of the existing arrangements, although opinion was divided as to where the fault lay. The majority composed of Ellenborough, Bird, T. H. Maddock and W. Casement, wished to do away with the Commission. Bird proposed that one member each from Bombay and Madras should be added to strengthen the Council with local knowledge and experience, but neither Casement nor Maddock supported him. To augment the practical utility of the Commission and also effect a saving, the retiring Fourth Member, Amos, suggested that "the Bengal civil servant, the English lawyer and the Secretary" should be dispensed with, and the remaining Commissioners from Bombay and Madras should be attached to the Legislative Department. The new Fourth Member, C. H. Cameron, however, held that it was a "pure fallacy" and "an abuse of word" to treat this proposal as a "reform" of the Law Commission; the proposition was nothing more than an expansion of the Fourth Member's secretariat. The remedy rather lay in taking steps to ensure that the schemes put forward by the Commission received prompt and adequate attention at the hands of the Government. The solution he proposed was that the Council for purposes of legislation should consist of "the present Council and the Law Commission united". Explaining the role of the Commissioners in this set-up, he observed, "The preparation of elaborate schemes and of disquisitions explaining and justifying them would still be the peculiar business of the Law Commissioners, but the other members of the Legislative Council would be present at the discussions which take place upon the matter which each Commissioner has prepared in his closet. These discussions would correspond to the conferences on the Code Napoleon, and the members of the new Council who are not members of the Law Commission would, by taking part in them, fit themselves during the progress of the work for pronouncing a judgement upon it when com-

plete".<sup>194</sup> This proposal of Cameron received no support from the other members. Bird argued that, with the members of the Executive Council preoccupied with administrative matters, the centre of gravity in legislation would shift from the Council to the Commission. This was particularly objectionable, because no one who did not participate in full in all matters that came up before the Council in its executive capacity was competent to legislate for India.<sup>195</sup>

From the various opinions recorded by the members of Ellenborough's Council, the Court of Directors were only too happy to come to the conclusion that the object with which the Law Commission was set up would not be attained through that body and that the services which it was capable of rendering were not commensurate to the heavy expense involved. It proposed to approach Parliament to amend the Charter Act for abolishing the Commission and directed the Government of India not to fill up vacancies occurring in that body in the meanwhile.<sup>196</sup> The strength of the Commission rapidly declined, and with the departure of D. Elliott and C. H. Cameron in February 1848, it ceased to exist. The authorities in England had as yet taken no step to secure the amendment of the statute as promised,<sup>197</sup> and Lord Dalhousie had "good ground"

<sup>194</sup> In his evidence before the Parliamentary Committee, F. J. Halliday favoured the inclusion of the Law Commissioners in the Legislative Council as they were to have "the means of urging, advocating, and carrying forward their own measures in the Council". Parl. Papers, H. C. No. 426 of 1852-53, Q, 1941.

<sup>195</sup> Leg. Dep. Pros., 7 April 1843, No. 17-20, and 23 December 1843, Nos. 1-5; Ellenborough's Leg. Letter to Court, 22 April 1843; and Pol. Dep. Pros., 10 May 1843, Nos. 1-4.

<sup>196</sup> Leg. Letter from Court, 29 November (No. 22) 1843. Henry St. George Tucker, a member of the Court of Directors, writing to Sir Robert Peel in 1842, observed, "My colleagues, I believe, are nearly unanimous in opinion that the Law Commission in India may be dispensed with. I do not go so far as to maintain that this Commission has been of no public utility, but I do think that a more simple machinery might be employed to answer every necessary purpose". J. W. Kaye (Ed.), *Memorials of Indian Government* (London, 1853), p. 63.

<sup>197</sup> Cameron characterised the action of the Court of Directors as follows: "I think, though this is not a direct contravention of the letter

to believe that this would not be done in the near future. After waiting for a few months in the expectation of receiving directions from the Court of Directors, he declared that it would be wrong of him to allow the Commission to be in abeyance any longer "knowingly and deliberately in direct disobedience to the law of the land". To satisfy the letter of the law and at the same time carry out the spirit of the Directors' instructions, he proposed that the Fourth Member and one other member of the Governor General's Council should be appointed to the Commission without any extra remuneration and there should be a full-time Secretary to enable the Commission to do some useful work.<sup>198</sup> The proposal was accepted by the Council and action was taken accordingly.<sup>199</sup> The Court of Directors approved of the device adopted to satisfy the letter of the law, but ordered that the appointment of a full-time Secretary should be dispensed with.<sup>200</sup> In obedience to this order, the Secretary of the Legislative Department was made responsible for the work of the Law Commission also. The Commission as reconstituted<sup>201</sup> lingered on in name till the revision of the Charter in 1853.

### B.—The Second Indian Law Commission

In the discussions which led to the enactment of the Charter Act of 1853, the Government of India was largely blamed for

of the law, it is what jurists call a proceeding in *fraudem legis*". Parl. Papers, H. L. No. 88 of 1852, Q. 2151 & 2154.

<sup>198</sup> Dalhousie's minute dated 21 August 1848, Leg. Dep., Original Consultation, 2 September 1848, No. 19; and minutes of Millett and Bethune, *ibid.*, Nos. 20-1. Also, British Museum, Add. Mss. 36476, ff. 372.

<sup>199</sup> Public Letter to Court, 28 August (43A) 1848.

<sup>200</sup> Leg. Letter from Court, 20 December (No. 22) 1848. Also, Leg. Letter to Court, 3 May (No. 10) 1849.

<sup>201</sup> There was a proposal to nominate both the civil members of the Council to the Commission. But this was not accepted, since "the Council and the Law Commissioners would thus become identical", and the Council would not be "in a condition to criticise and judge the recommendations of the Law Commissioners if such should be submitted to them". Leg. Dep. Pros., 17 February 1849, Nos. 1-5, and 14 April 1849, Nos. 3-4. Since the Fourth Member was statutorily the permanent Fourth Member of the Council, the other civil member appointed to the

the failure of the first Law Commission, although the responsibility of the authorities in England was no less in the matter. The establishment of the second Commission in England was clearly a reflection on the policy of the previous administrations, and it was also an expression of the earnest desire of Parliament to see that comprehensive judicial and legal reforms were introduced into India as early as possible. The President of the Commission was Sir John Romilly, Master of the Rolls of the High Court of Chancery, and "a Benthamite friend of James Mill in his younger days".<sup>202</sup> The other members were Sir John Jervis, Chief Justice of the Common Pleas, T. F. Ellis, Robert Lowe (later Lord Sherbrooke), a member of Parliament intimately acquainted with Colonial courts of justice, Sir Edward Ryan, former Chief Justice of the Supreme Court at Calcutta, C. H. Cameron and J. M. Macleod, both of them members of the first Law Commission, and F. Millett, who had been associated with the first Law Commission as Secretary and was later a member of the Governor General's Council. Millett and Hawkins acted as Secretaries at different times. The Commission was thus composed of the best legal luminaries of England, and of persons with judicial experience in India and associated with the work of the first Law Commission.

The period within which the second Law Commission was to submit its reports was fixed at three years from the date of the enactment of the Charter Act of 1853. As such, the time at the disposal of the Commission was very brief, and it could consider only a couple of important subjects. Macaulay's penal code was left to be settled in India, because much progress had already been made by the Legislative Council in this respect. Under directions received from the Board of Control, the Commissioners reported first upon civil and criminal procedure in respect of Bengal on the basis of the Supreme and Sadr Courts at Calcutta being

Commission was named first in the warrant and became the head of the Commission. Leg. Dep., Original Consultations, 2 September 1848, Nos. 20-1, and Leg. Dep. Pros., 14 April 1849, Nos. 5-6.

<sup>202</sup> Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), p. 258.

amalgamated.<sup>203</sup> Similar reports were furnished later in respect of the North-Western Provinces<sup>204</sup> and the Presidencies of Bengal and Madras.<sup>205</sup> While considering these matters, the Commissioners evinced great interest in the subject of the *lex loci*, upon which the first Law Commission had submitted a valuable report in 1840. They expressed their decided opinion that no attempt to codify the personal laws of the Hindus and Muhammadans should be made, because any such attempt "might tend to obstruct rather than promote the gradual process of improvement in the state of population".<sup>206</sup> As regards the other sections of the population, they stressed the urgency of preparing a code of substantive civil laws on the lines indicated by the first Commission. While the existence of two different systems of civil law in respect of them within and without the Presidency towns was anomalous enough, the anomaly would be more with the amalgamation of the Supreme and Sadr Courts.<sup>207</sup> They also made it clear that they would not have the time to prepare such a code within the period laid down by the statute. Two of the Commissioners, Sir John Jervis and Robert Lowe, however, expressed the view that English Law should be recognised as the *lex loci* of the mofussil areas forthwith without waiting for the preparation of the proposed code.<sup>208</sup>

<sup>203</sup> Parl. Papers, C. 2035.

<sup>204</sup> Parl. Papers, C. 2097.

<sup>205</sup> Parl. Papers, C. 2098. In preparing the Civil Procedure Code, the Commissioners were greatly assisted by Millett's draft of 1835, and by the work of A. J. M. Mills and H. B. Harrington, the special commissioners whom Dalhousie appointed for revising it. As regards criminal procedure, they had before them the draft prepared by Cameron and Elliott in 1846-47. Leg. Dep. Pros., 4 November 1853, No. 17, and Papers of Act VIII of 1859, pp. 21-3.

<sup>206</sup> Parl. Papers, C. 2036, p. 8.

<sup>207</sup> The Commissioners observed, "In the present state of the population of India, it is necessary to allow certain great classes of persons to have special laws, recognised and enforced by our courts of justice, with respect to certain kinds of transactions among themselves. But we think that it is neither necessary nor expedient that, for any persons, the law should vary according as they reside within or beyond the boundary of the capital." *Ibid.*, p. 8.

<sup>208</sup> *Ibid.*, p. 11.



There was some controversy as regards the procedure to be adopted in implementing the recommendations of the Commissioners. A view was expressed that firm decisions should be reached in England and the Government of India should have no discretion in the matter of legislating upon them.<sup>209</sup> His Majesty's Government, however, rejected the suggestion and forwarded the reports of the Commissioners for the due consideration of the Legislative Council of India.<sup>210</sup> Sir John Jervis, one of the Commissioners, resigned alleging that the Commission had only been used to postpone legislation and its reports were being shelved by a reference to the Indian Government.<sup>211</sup>

These fears proved to be groundless. The reports of the Commission had a fairly good reception in India and the Bills based on them had smooth passage through the Legislative Council of India. The code of civil procedure was passed into law in 1859 and that on criminal procedure in 1861. The amalgamation of the Supreme and Sadr Courts was effected by an Imperial statute, the Indian High Courts Act of 1861. Only the recommendations of the Commission in respect of the question of the *lex loci* remained to be implemented. The subject was taken up later by the third Indian Law Commission, and the Indian Succession Act of 1865 was passed on the basis of its recommendations. The career of the second Law Commission was thus placid and uneventful unlike that of the first Commission, but its work was crowned with solid achievements.

<sup>209</sup> Speech of Sir Erskine Perry, 26 June 1857, Hansard (III Series), Vol. CXLVI, pp. 446-7.

<sup>210</sup> In defending the policy of the Government, Vernon Smith, President of the Board of Control, observed that the course of proceeding suggested "would have affronted the Legislative and Executive Councils of India". He asked if, after setting up a reformed Legislative Council, it was expedient "that his first official act should tend to set that Council at nought, and set up his own *ipse dixit* founded upon the report of the Commission". *Ibid.*, pp. 447-8. Also, speeches of the Duke of Argyll and Lord Ellenborough in support of the Government's policy, Hansard (III Series), Vol. CXLV, pp. 1871 & 1874.

<sup>211</sup> Letter dated 22 May 1856, Parl. Papers, C. 2098, p. 155.

CONTROL OVER LEGISLATION BY THE  
AUTHORITIES IN ENGLAND*A.—Position under the Charter Act of 1833**Legal Limits of the Authority of the Court of Directors*

THE framers of the Charter Act of 1833, it has been explained earlier, wanted to set up a central authority in India with plenary powers of legislation extending over the whole of the Company's possessions and free from the excessive control of the authorities in England. While the Act retained the general power of the Court of Directors to disallow any of the laws, duly enacted by the Governor General in Council, it made the assent of the Court prior to enactment necessary only in respect of certain specified matters.<sup>1</sup> But, right from the beginning, the Directors assumed that their power to control legislative policy was as full and extensive as before and that it had in no way been curtailed by the new statute. This view found clear expression in the general tone of their Public Letter dated 10 December 1834. Further, in this letter, they directed that all measures affecting the jurisdiction of the Supreme Courts, or extending the opportunities of European British subjects to hold lands or landed interests, should be submitted to them for their consideration before enactment, even though they referred to matters which did not require their prior sanction under the law.<sup>2</sup> Again, in 1836, they censured the Government of India for carrying into effect, without regard to their expressed views and sentiments, several measures of the highest importance, namely, the abolition of corporal punishment in the native army, the liberation of the press, the establishment of a new currency system, and the introduction of English education. The Governor General in Council was

<sup>1</sup> See pp. 61-3 above.

<sup>2</sup> Public Letter from Court, 10 December (No. 44) 1834, paras 50 & 64. Also, Judicial (Civil) Proceedings, 29 June 1835, No. 1.

instructed not to adopt in future "any new measures or pass any new laws affecting in any material degree the civil or military administration of our affairs which may be inconsistent in principle with our instructions or recorded opinions", and he was warned that he would be held responsible "for any violation of this distinct order, excepting in cases in which a paramount necessity for acting without the delay of a previous reference to us can be demonstrated".<sup>3</sup> The Government of India did not enter any protest against these orders; on the other hand, they promised strict obedience in the future.<sup>4</sup>

The first challenge to the authority of the Court of Directors came from Lord Ellenborough. In 1842, he blocked the passage of the Bill for the incorporation of the Assam Company, ignoring the instructions of the Directors and overriding the wishes of his colleagues. On this occasion, however, the main point at issue was the competence of the Governor General to overrule his Council in legislative matters, not the *de jure* rights of the Directors, and no decision was reached on the latter question. The subject came up again for consideration in 1846 in the time of Lord Hardinge. It was in connection with certain remarks made by the Directors on the report of the Law Commission on the setting up of Subordinate Civil Courts in the Presidency towns. "We are aware", they observed, "that the Legislative Council of India have power to make laws and Regulations for all courts of justice, whether established by Her Majesty's Charters or otherwise under the jurisdiction thereof"; but it seems to us desirable that fundamental alterations in the administration of English law by English judges should not be suggested without the gravest consideration, and ought never to be carried into effect without the previous sanction of the Home authorities."<sup>5</sup> Commenting upon this directive, the Fourth Member of the Council, C. H. Cameron, questioned the competence of the Court of Directors

<sup>3</sup> Leg. Letter from Court, 14 April (No. 1) 1836.

<sup>4</sup> Leg. Letter to Court, 22 August (No. 10) 1836.

<sup>5</sup> Leg. Letter from Court, 20 October (No. 13) 1847. Italics by the author. In a marginal comment, Cameron observed, "This can hardly have been what Parliament intended when it made such previous sanction necessary only for the abolition of the Queen's Courts."

to issue such instructions, and he hoped that there was no intention to impose "any new restriction" on the authority of the Legislative Council of India which was not contemplated by the Charter Act.<sup>6</sup> On the matter being referred to the authorities in England, the Directors sought the advisory opinion of the Attorney and Solicitor General and the Company's Standing Counsel. In a joint opinion they expressed the view that the Directors had acted quite within their powers and any disobedience to their orders in legislative matters would be misdemeanour at law in the same way as in executive matters under Section 80 of the Charter Act of 1833.<sup>7</sup>

But the opinion of the legal advisers, however high their authority, was not final or binding, and the Government of India continued to resent these encroachments upon its powers. In 1848, commenting upon a draft measure relating to discipline in the Indian navy received from the Court of Directors,<sup>8</sup> Bethune took strong objection to the formal sanction given not only to such portions of the measure as required such sanction under the law but to the whole of the measure. He observed, "It seems desirable that the limitations placed by Statute on the legislative power of the Governor General in Council should be kept strictly in view, so as not to give any cause for confounding the restrictions arising out of the express terms of the Statutes by which his powers are created and defined and those which result only from the deference due to

<sup>6</sup> Minute dated 27 July 1846, Leg. Dep. Pros., 13 March 1847.

<sup>7</sup> The legal advisers observed, "The object of the 80th Section appears to have been to maintain and secure full effect to the first and principal enactment of the Statute providing that the territorial acquisitions in India shall be under the Government of the East India Company, and that since by virtue of the control vested in the Commissioners for the Affairs of India, the orders and instructions of the Court of Directors are, in substance, the orders and instructions of the English Government, there is, in our opinion, no doubt that the most large and full operation is due to the provisions contained in the 80th Section." Leg. Letter from Court, 20 October (No. 13) 1847. Sir Lawrence Peel, Chief Justice of the Calcutta Supreme Court, supported the claim of the Court of Directors (Hansard, III Series, Vol CXXIX, pp. 776-7), while Sir Erskine Perry, Judge of the Bombay Supreme Court, expressed a contrary opinion (Parl. Papers, H. L. No. 20 of 1852-53, Q. 2764-74).

<sup>8</sup> Marine Letter from Court, 12 January (No. 1) 1848.

the declared opinions of the Honourable Court."<sup>9</sup> The Directors did not meet this fresh challenge to their authority directly. They only observed that it was not safe to limit their formal sanction to portions of a Bill, because the provisions of any legislative measure would be very much interdependent and it would be open to a court of law to impugn the measure as a whole for not having received their prior sanction as required by law.<sup>10</sup> Again, in 1849, the Court of Directors issued certain instructions in respect of a proposed measure for the appointment of an Administrator General for Bengal. On the margin of the Despatch, three members of the Governor General's Council recorded their views questioning the competence of the Directors to dictate to the Indian Legislature to pass anything into law, and interpreted the directions to be only "suggestions" for its consideration.<sup>11</sup> These views do not appear to have been communicated to the authorities in England. On the whole, during this period, the Court of Directors may be said to have successfully maintained its claim that it had full authority to control legislative policy in respect of all matters and at all stages.

*Matters Referred to the Court of Directors  
prior to Legislation*

Although the Court of Directors recognised no legal barriers to the exercise of its authority, there were obvious limits beyond which it was not wise to exercise such control: India could not be administered from London. The general trend of the discussions at the time of the enactment of the Charter Act was clearly against excessive control by the authorities in England. In practice, therefore, the initiative in legislative

<sup>9</sup> Leg. Dep. Pros., 27 May 1848, Nos. 21-3.

<sup>10</sup> Marine Letter from Court, 23 August (No. 7) 1848. It is interesting to note that the previous Fourth Member, C. H. Cameron, expressed on an earlier occasion the same view as that held by the Court of Directors. Leg. Dep. Pros., 5 June 1847, No. 3.

<sup>11</sup> Leg. Despatch from Court, 14 March (No. 8) 1849. See also marginal comments of J. E. D. Bethune on Leg. Letter from Court, 13 March (No. 6) 1850.

matters lay mostly with the Government of India, and laws were normally enacted without prior reference to the Court of Directors. In these matters the Directors played the role of an *ex post facto* superintending authority; they scanned the legislative proceedings of the Council, which were sent to them regularly with quarterly résumé of events, expressed approbation or disapprobation of particular measures, and issued, specific directions wherever necessary.

While this was the general practice, it was usual to refer certain types of cases to the Court of Directors for orders prior to legislation. In the case of some of them, the requirements of the statutes or the directions of the Court made a reference necessary. In others, the inherent complexity and importance of the measures made it highly desirable to secure the approval of the superior authorities in advance. The most important category of cases so referred related to measures in respect of which it was doubtful if the Government of India had the power to legislate. The Charter Act, it is true, had conferred quite extensive powers upon the Government of India; but the few restrictions imposed on its authority raised a number of delicate questions which it did not feel competent to decide finally without a reference to the Directors. This was the case in respect of measures which might affect the prerogative rights of the Crown, *e.g.*, grant of patents and corporal or monopoly rights, commutation and remission of penalties imposed by the Crown Courts, naturalisation of aliens, escheats, etc. This was also the case in respect of measures which affected matters outside the territorial jurisdiction of the Government of India, *e.g.*, matters relating to crime on the high seas and such other admiralty problems, extra-territorial crimes, administration of cantonments located in the Indian States in subordinate alliance with the Company, etc. There were a number of other similar matters which are discussed in detail later on. The references from the Government of India on these subjects involved doubtful points of law. They were invariably passed on by the Court of Directors to the Attorney and Solicitor General and the Company's Standing Counsel, and the opinions tendered by them were communicated to the Government of India, along with such

other instructions as the Directors thought fit to issue.

Next in importance came measures which affected the interests of not only the Company's possessions but also of Great Britain and the rest of the British Empire, e.g., emigration of Indian labourers to the British colonies, traffic in slaves, navigation laws, insolvency laws affecting European British subjects, and transportation of European convicts to the penal settlements outside India. The Court of Directors issued their instructions on these matters generally after consulting the concerned Departments and interests in England. Some of these subjects were of such importance that policy decisions on them were taken by the British Government, and where legislation in respect of the whole of the Empire was necessary, it was undertaken by Parliament.

Besides these, the following types of cases were generally referred to the Court of Directors for instructions prior to legislation, some of them because of specific orders from the Directors to this effect and the others on the initiative of the Government of India itself. (a) Measures involving far-reaching changes in the legal system such as the *lex loci* project and the penal code. (b) Measures relating to appeals to the Privy Council, the constitution and jurisdiction of the Crown Courts, and the rights and interests of European British subjects, e.g., Acts XI of 1839 and II of 1844<sup>12</sup> concerning the Privy Council, draft Bills for the reform of the Courts of Requests in the Presidency towns and for extending the jurisdiction of the Company's criminal courts over European British subjects, and Act IV of 1837 to enable His Majesty's subjects to acquire land or landed interests in any part of the Company's territories. (c) Measures for conferring corporal rights or monopoly privileges<sup>13</sup> as, for instance, on the Banks

<sup>12</sup> Advising against the enactment of Act II of 1844 without prior reference to the Court of Directors, C. H. Cameron cautioned, "I hardly think we ought to take upon ourselves to set the matter right by our own legislative power, particularly in a matter of such great delicacy as the right of appealing to Her Majesty in Council." Leg. Dep. Pros., 22 July 1845, No. 25.

<sup>13</sup> While communicating the opinion of the Law Officers in England that such privileges could be granted by the Indian Legislature, the Court of

of Bombay, Madras and Bengal, the Union Bank of Calcutta, and the Assam Company. (d) Measures for levying customs duties, and projects relating to shipping and navigation, particularly when they had a bearing upon the Navigation Laws, e.g., the draft Bill for the levy of harbour duties at Singapore,<sup>14</sup> and Act XI of 1841 and XI of 1850 concerning registration of ships for securing the advantages of the British registry. (e) Measures involving treaty rights and important questions of state policy, e.g., Act I of 1844 relating to the Nawab of the Carnatic<sup>15</sup> and Act XXIV of 1839 relating to the administration of the Hill Zamindaris of Ganjam and Vizagapatam.<sup>16</sup> (f) Measures in which Parliament and the British public were greatly interested. e.g., dissociation of the Government from native religious institutions.

It is clear from this discussion that the occasions on which legislative measures were specifically referred to the Court of Directors prior to enactment were many and various and covered most of the important issues.<sup>17</sup> Besides these, a good

Directors observed that it was "unwilling that such a power should be exercised in any instance without previous reference to the Home authorities", and directed that all measures "for creating any corporation or for limiting the liability of members of any trading association" should receive prior sanction. Leg. Despatch from Court, 3 July (No. 8) 1839 and 2 November (No. 19) 1842.

<sup>14</sup> In the Legislative Despatch of 16 November (No. 3) 1836, the Court of Directors had instructed that no measures imposing any duties at the port of Singapore should be passed without its previous sanction. Although the order strictly referred only to customs duties, the Government of India referred this measure to the Directors. Leg. Letter to Court, 27 May (No. 13) 1839.

<sup>15</sup> The measure was referred to the Court of Directors because of its earlier orders, the views expressed by the Local Government, and the objections raised by the Supreme Court. Leg. Letter to Court, 25 November (No. 27) 1839. Also, Leg. Letter from Court, 3 May (No. 10) 1843.

<sup>16</sup> Leg. Letter from Court, 15 March (No. 4) 1839.

<sup>17</sup> In the case of measures referred for the prior approval of the Court of Directors, it was the general practice to publish draft Bills for public information after the receipt of the Court's sentiments. The result was that those who objected to the Bills had no opportunity to place their views before the authorities in England. J.E.D. Bethune drew the attention of the Governor General's Council to this point, and the draft Bills for bringing European British subjects within the jurisdiction of the



number of cases came up before the Directors, because of their financial implications or other reasons, when they were still under the consideration of the administrative Departments and the question of legislation had not been formally taken up. In his evidence before the Select Committee of Parliament, J. S. Mill observed, "I think a case can hardly happen in which the Government of India is not tolerably well aware, from previous despatches, whether the course which is about to be adopted is likely to have the approval of the Home authorities".<sup>18</sup> The Directors did not, therefore, suffer from any want of power or opportunity to play a positive role in giving shape and direction to the policy of the Government of India in legislative matters if they were so minded.

*Nature and Extent of Control Exercised by the  
Court of Directors*

From the facts elucidated so far, it is clear that the Court of Directors was quite vigilant in maintaining unimpaired its authority over the Government of India in legislative matters, and it insisted upon being consulted, prior to legislation, upon all important matters. However, there was no attempt to legislate for India from Leadenhall Street. The instructions of the Directors were generally couched in the form of suggestions and general directions. Even in such important matters as the rules governing the legislative proceedings of the Governor General's Council, the penal code of Macaulay and the abolition of slavery, there was no attempt at dictation. Again, even while the most positive directions were issued, there was usually a proviso giving discretion to the Government of India to make adjustments to suit local needs and unexpected circumstances.<sup>19</sup> Coming from such a high

Company's criminal courts were read in the Council and published prior to their reference to the Court. Leg. Letter to Court, 26 October (No. 19) 1849, and Leg. Dep. Pros., 10 May 1850, No. 25.

<sup>18</sup> Parl. Papers, H. L. No. 88 of 1852, Q. 2992.

<sup>19</sup> Indeed, the Court of Directors was in no position to play any other role. Pointing out that its control could only be of a general character, David Hill, Examiner in the Judicial Department at the India House,

authority, however, the views of the Directors commanded great respect. They often tipped the balance when opinion was divided in the Governor General's Council, *e.g.*, on the question of the steps to be taken for the abolition of slavery. When the Government of India felt obliged to depart from the instructions received from England, it gave reasons for its action. Differences between the two bodies sometimes led to prolonged correspondence and there was inordinate delay in legislation, *e.g.*, the proposal to abolish the Recorder's Court at the Straits Settlements.

The Court of Directors was particularly anxious to get through measures in which Parliament and the British public were interested, *e.g.*, abolition of slavery and corporal punishment, emigration of Indian labourers to the British colonies, dissociation of the Government from native religious practices, and salt laws. The general approach of the Directors to legislative problems was conservative. They had no faith in the project of legislative reform launched in 1833 or the manner in which the Law Commission worked. They were hesitant to do anything which was actively opposed by the judges of the Supreme Courts or the European British subjects in India. Where there was no unanimity in India, their habit was to procrastinate, unless there was some precipitating factor as there was on the question of slavery. They were quite shy of approaching Parliament for relief in any matter as was well displayed in the case of the proposed abolition of the Law Commission. When the Government of India put forward projects not strictly within the purview of its legislative authority, they were quite willing to stretch the letter of the law as much as possible to enable their enactment. They were,

observed that the Home Government had "little means of revising the legislative proceedings of the Indian Government, where a decision has been arrived at by the Governor General, with his Indian Councillors, and of the fourth member of Council, as well as by the Law Commission, consisting of the best men who could be selected to consider such a subject". An appeal to its judgement would, in fact, be a reference from a higher to a lower authority.—Cited by C. H. Cameron in his petition to the Select Committee of Parliament, dated 15 November 1852. Parl. Papers, H. C. No. 426 of 1852-53, Appendix VII, pp. 421-2.

however, disinclined to propose any amendment to the Charter Act prior to its general revision at the scheduled time. On the whole their basic approach to legislative problems was nearly the same as that of the Government of India, and differences of a fundamental character were not likely to arise.

Sharp differences and conflicts were, however, inevitable on occasions, and this was particularly marked during the early years of the Charter period. The Directors were quite critical about the abolition of corporal punishment,<sup>20</sup> the introduction of a common currency throughout India,<sup>21</sup> and the removal of restrictions on the press. Particularly with Macaulay on the scene, they were afraid that the Governor General's Council might turn into a run-away horse, and more revolutionary measures than the above might be presented to them as *fait accompli*. Hence their stern direction that the Council should not depart from the instructions issued to it in legislative matters.<sup>22</sup> But none of the above measures was set aside by the Directors. In the case of the measure for removing certain restrictions on the press, they observed that it was inspired by a doctrinaire spirit and prompted "by an unwise desire for temporary praise than fear of a just and lasting blame", and they would welcome a return to the former system which would render their formal interference unnecessary. They did not, however, press for its immediate repeal at the earnest solicitation of Lord Auckland.<sup>23</sup> The enactment was in force till 1867, except during the emergency created by the Revolt of 1857, when its operation was temporarily suspended. As regards the abolition of corporal punishment also, there was no immediate going back on the decision of the Government of India. After prolonged discussion, both in India and England, it was partially reintroduced by Act III

<sup>20</sup> A General Order of 1835 substituted dismissal from service to flogging in the native army. Again, under Bengal Regulation II of 1834, flogging by the order of any court of Magistrate was abolished, except as a measure of jail discipline.

<sup>21</sup> Acts XVII and XXI of 1835.

<sup>22</sup> See p. 226-7 above.

<sup>23</sup> Leg. Letter from Court, 1 February (No. 1) 1836, and Leg. Letter to Court, 19 September (No. 11) 1836.

of 1844 in cases of petty larceny generally and in the case of offenders of tender age,<sup>24</sup> and by Act XX of 1845 in the case of certain military offences committed by the native officers and soldiers of the Company's army.<sup>25</sup> These changes were not forced upon India; the Governor General's Council was unanimous in passing the second measure, and, in the case of the first, only C. H. Cameron expressed his dissent.

There were serious conflicts in the time of Ellenborough also. The main questions at issue then were the continuance of the office of the Fourth Member, the abolition of the Law Commission, the participation of the Fourth Member in the proceedings of the non-Legislative Departments, and the enactment of the Assam Company Bill. In all these matters, it is significant to note that the Court of Directors accepted in general the views of the majority of the members of Ellenborough's Council, and the differences were mainly with the Governor General, who persistently defied the authority of the Directors. His recall eased the situation.

In the time of Hardinge and Dalhousie the principal source of misunderstanding was the Directors' claim that they had a constitutional right to control legislative policy at all stages. The controversy was more or less of a theoretical nature, and it had no direct bearing on the specific legislative projects under consideration. When Cameron first raised the issue in 1846 in connection with the instructions received from the Directors on the setting up of Subordinate Civil Courts in the

<sup>24</sup> Justifying the revival of corporal punishment, the President of the Council, W. W. Bird, observed that the proposal had been recommended "by the Home authorities, by the Court of Nizamat Adawlat, by the Medical Board, and by the Government of Bengal, in short by all the authorities who are practically best acquainted with the subject". Leg. Dep. Pros., 2 December 1843, Nos. 4-5. Also, Judicial Letter from Court, 28 September (No. 12) 1842.

<sup>25</sup> In reporting on the subject, the Government of India observed that, "considering the conflicting opinions which have prevailed on former occasions since 1835, whenever the question has been brought forward for deliberation", it was happy to state that there was complete unanimity on the subject among the members of the Council of India and the Councils and Commanders in Chief of the Presidencies. Secret Letter to Court, 18 September (No. 77) 1845.

Presidency towns, the Government of India had not expressed any opinion on the merits of the measure. When next Bethune questioned the constitutional propriety of the action of the Court of Directors in giving their formal assent to the *whole* of the draft Bill on discipline in the Indian navy instead of only to such portions in respect of which their assent was required by law, the Directors denied the charge and censured the Fourth Member for the tone of his minute, which was "such as ought not to be found in any official records". They, however, accepted most of Bethune's suggestions for the modification and improvement of the Bill.<sup>26</sup>

Apart from these incidents wherein nerves were frayed and tension mounted high, there were also some other matters in which the Court of Directors and the Governor General's Council thought differently. In 1835, a law was enacted to provide for the absence of the Governor of Madras from his Presidency at the time and it laid down that his orders during the period of his absence were as valid as his orders in Council.<sup>27</sup> The question of enacting a general law on these lines to provide for the occasional absence of the Governors from their respective Presidencies was also mooted on the occasion. The prior sanction of the Court of Directors was sought for the measure, because the competence of the Governor General's Council to pass such a law was questioned by the Advocate General of Bengal and also by one of the members of the Council. The Directors turned down the proposal. They considered the measure to be in excess of the powers of the Government of India, and they also felt that the absence of the Governors of Bombay and Madras from the seat of their Governments, "the scene of the great business which they are appointed to transact", was highly objectionable.<sup>28</sup> The Directors were persistently critical also of Act XXXI of 1841. This measure put an end to multiplicity of

<sup>26</sup> Marine Department Letter from Court, 23 August (No. 7) 1848. Leg. Dep. Pros., 27 May 1848, Nos. 21-3, and 30 December 1848, No. 12.

<sup>27</sup> Act I of 1835.

<sup>28</sup> Leg. Letter to Court, 25 January (No. 1) 1836; Leg. Dep. Pros., 4 January 1836, Nos. 1-4; and Leg. Letter from Court, 11 January (No. 1) 1837.

appeals in criminal cases and was framed on the principle, "one trial and one appeal". The Directors held that the right enjoyed earlier was not in fact a right of appeal but a right to petition only. Under the new law, they were afraid that the proportion of cases to be heard on appeal would increase enormously. There were further discussions, but the measure stood intact till the passing of Act XVII of 1862.<sup>29</sup> Again, the Directors were not satisfied with and expressed anxiety regarding the various measures passed in respect of registration of deeds. Under Act I of 1843, as modified by Act XIX of the same year, registered instruments were given precedence over unregistered ones in respect of "every deed of sale or gift of lands, houses or other real property". Act IV of 1845 was passed to overcome the hardship caused by the rule that registration should take place only in the district in which the property was located. It was now provided that deeds might be registered also in the district in which the transfer occurred or in which the parties resided. The Directors expressed the fear that these measures might be injurious to the interests of persons who acquired property in "entire good faith and according to long and well-established practice", and that registration of deeds in a district other than the one where the property was situated might increase "the liability of a fair title to property becoming void through some undiscovered act of registration". They drew the attention of the Government of India repeatedly to the importance of the interests involved, the shortcomings of the system introduced by these measures, and the need for placing the whole matter on a sound footing.<sup>30</sup>

<sup>29</sup> Leg. Letters to Court, 22 April (No. 9) 1842, paras 15-7, 18 January (No. 3) 1844, and 28 March (No. 3) 1851, paras 25-33. Leg. Letters from Court, 1 February (No. 1) 1843, paras 5-7, 3 April (No. 8) 1844, and 29 October (No. 17) 1851, paras 25-34.

<sup>30</sup> Leg. Letters to Court, 14 September (No. 18) 1843 and 19 July (No. 21) 1845. Leg. Letters from Court, 24 July (No. 17) 1844, 14 January (No. 1) 1846, 29 September (No. 11) 1847, 9 February (No. 3) 1848, 6 September (No. 19) 1848, paras 19 & 47, 6 June (No. 11) 1849 para 4, and 16 October (No. 16) 1851. The great difficulties involved in legislating on the subject is seen from Sir Henry Maine's speech in the Indian Legislative Council on 23 March 1864. Proceedings of the Council of the

It was not, however, till the enactment of Act XVI of 1864 that comprehensive action was taken and these measures were repealed. The Directors also rejected a proposal from the Government of Bombay for branding (*goodna*) convicts transported for life and directed that the practice should be stopped in the other two Presidencies where it was then prevalent. The Government of India was agreeable to the suggestion except in the case of the *thugs* and such other types of criminals. The Directors would not, however, admit any such reservation, and Act II of 1849 was passed giving effect to their orders.<sup>31</sup> Again, at the instance of missionary institutions, the Directors exercised a continuous pressure on the Government of India for the dissociation of the Government and its officials from any participation in the activities of religious institutions. The Directors and the Government of India could not also easily reach an agreement on the reform of the Courts of Request in the Presidency towns, and protracted discussion and correspondence preceded the enactment of Act IX of 1850. And, lastly, the Directors were not favourably inclined towards the *lex loci* proposals of the Government of India, and the measure could not be passed for want of their sanction.

While the occasions on which the Court of Directors and the Government of India differed were many, the power to disallow laws after they were duly enacted vested in the former was exercised only in respect of one measure, namely, Act I of 1834 concerning the legality of the proceedings of the Government of India at the time when Bentinck was ailing at Ootacamund.<sup>32</sup> The enactment was in fact in excess of the powers of the Government of India. Parliament indemnified the latter and regularised its proceedings by 5 & 6 Wm.IV, c.6.

On the whole, the relations between the Court of Directors

Governor General of India assembled for the purpose of making Laws and Regulations, Vol. III, 1864, pp. 77-9.

<sup>31</sup> Leg. Letters to Court, 16 October (No. 30) 1847 and 15 September (No. 18) 1849. Leg. Letters from Court, 14 July (No. 5) 1847 and 9 February (No. 3) 1848.

<sup>32</sup> Leg. Letter from Court, 4 March (No. 2) 1835.

and the Government of India were smooth. The extensive powers of control claimed by the Directors were not exercised in an unreasonable manner. In spite of the large number of references to the Directors prior to legislation, success or failure depended mostly on the interest, initiative and drive of the Government of India.<sup>33</sup> It was rare that a project which had a good measure of support in India was blocked by the Directors. The latter's views tipped the balance and affected materially the course of policy only when a Bill was highly controversial and influential interests were strongly opposed to it. However, if the Directors were progressive-minded and animated by reformist zeal, they had enough opportunity to influence and shape Indian legislative policy. Their whole approach being conservative, their authority only lent support to the inertia and conservatism of the majority of the members of the Governor General's Council, with the result that the legislative achievement under the Charter Act of 1833 was thoroughly disappointing.

#### *B — Position under the Charter Act of 1853*

##### *Renewed Struggle to Maintain the Independence of the Legislative Council of India*

The Charter Act of 1853 introduced no change in the relationship between the Court of Directors and the Government of India in legislative matters and the legal position remained unaltered. At the time of its enactment, the attention of Parliament had indeed, been drawn to the Government of India's protests against the Directors' claim that they had a general and undefined power of control in all legislative matters in addition to the specific powers conferred by the statutes relating to India. But the British Government had

<sup>33</sup> In his speech during the second reading of the Government of India Bill, Macaulay testified that real decisions were taken in India, and these were rarely set aside by the authorities in England. "The business of the Home Government", he observed, "is rather to judge what is best, than to give positive directions for the future." Hansard (III Series), Vol. CXXVIII, pp. 744-5.



taken the view that the Directors required the power for the good government of India and, since this claim had the support of eminent legal authorities, no further clarification of the law was required.<sup>34</sup> The new Legislative Council of India did not, however, accept this position. At the very beginning, Lord Dalhousie warned about the possibility of conflicts between the Law Commission set up in England and the Legislative Council in India, and said that the latter may not be so amenable to the wishes of the authorities in England as had been presumed.<sup>35</sup> This proved to be something of a premonition. While the members of the Legislative Council were by no means itching for a fight and were anxious to work in harmony, they were quite sensitive to any interference with their constitutional rights and privileges. Trouble cropped up in connection with Act VIII of 1855, a measure to amend the law relating to the office and duties of the Administrator General at the three Presidencies. Prior to its enactment, the Court of Directors had advised that a commission of 5% should be charged uniformly in all the Presidencies. Further, while the Administrators at Bombay and Madras were to be allowed to retain the whole of the commission as their fee, the officer in Bengal was to keep only 3% for himself and remit the balance to the treasury. In passing the measure into law, the Legislative Council of India took note of the views of the Directors but fixed different rates of commission, 3% in Bengal and 5% in the other two Presidencies, and allowed the Administrators at all the three centres to retain the whole of the commission as their fee.<sup>36</sup> Objecting strongly to this contravention of their specific instructions, the Directors disallowed so much of the enactment as was inconsistent with their views and directed that their orders should be strictly followed.<sup>37</sup> The Legislative Council in India reacted violently. The historic resolution of the body, passed unanimously at a meeting held on 8 December 1855, with Lord

<sup>34</sup> See pp. 88-9 above.

<sup>35</sup> W. Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904) Vol. II, pp. 236-7.

<sup>36</sup> Papers of Act VIII of 1855.

<sup>37</sup> Proceedings of the Legislative Council of India, 1854-55, pp. 747-8.

Dalhousie presiding, was as follows :—

That, in the judgement of this Council, formed after mature deliberation, the Honourable Court of Directors does not possess the right to require the Council to pass any law which the Honourable Court may think fit to direct.

That this Council, being of opinion that there is no sufficient reason for amending Act No. VIII of 1855 in the manner desired by the Honourable Court of Directors, respectfully declines to amend it.

That a repeal of this Act would not effect the object of the Honourable Court, and would be contrary to their intentions; and that it ought not to be repealed.

That this Council, admitting to the fullest extent the right of the Honourable Court to disallow any law made by the Governor General in Council, and the duty of this Council thereupon to repeal such law, desires to record its opinion that the Honourable Court has not the power to disallow only a part of an Act, unless the same relates to two or more subjects so wholly unconnected that the part disallowed amounts in substance to be a distinct law.<sup>28</sup>

The constitutional crisis created by the adoption of the resolution was much more serious than when Lord Ellenborough and later on Lord Hardinge and his Council recorded their protest on the very same issue. The Council had now two judges of Her Majesty's Court as its members. They were not servants of the Company, and as such they were not subject to the penal provision contained in Section 80 of the Charter Act of 1833, on which the Court of Directors

<sup>28</sup> *Ibid.*, pp. 838-9 ; also, pp. 769-79. Referring to these resolutions, Dalhousie wrote to Vernon Smith, President of the Board of Control, "I respectfully advise the Home authorities to get rid of this difficulty as soon as they can. We are certainly unanimous, and twelve successors would be equally unanimous to-morrow." W. Lee-Warner, *The Life of the Marquis of Dalhousie* (London, 1904). Vol. II, p. 244. Referring to the same matter, Lord Canning wrote to the Secretary of State for India on 9 December 1859, "I am not prepared to say that the position was, as the law stands, an unsound one, but if it is not intended that the Council should retain it, the sooner this is declared authoritatively the better." *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 35.

depended for enforcing obedience to its authority. Further, the Council was deliberating in public, and the controversy was receiving the widest publicity. The Court of Directors met this open challenge to its authority with dignified silence. Act VIII of 1855, which had given rise to the whole controversy, was not amended till 1860, and then too not in respect of the point referred to by the Directors. The Legislative Council had emerged victorious in this conflict,<sup>39</sup> and from this time onwards the Court of Directors, and later the Secretary of State for India, took care not to tread on its corns again.<sup>40</sup> On two other occasions, however, the authority of the Secretary of State came to be assailed. The first time, it was in connection with the pension granted to the descendants of Tipu Sultan by him without consulting the authorities in India. As has been mentioned earlier, the Legislative Council refused to accept the contention that it had no *locus standi* to discuss the action of the Secretary of State for India. It held that it was *intra vires* of its powers to discuss the matter, as it had a direct bearing on the financial measures before it.<sup>41</sup> Again, when the right of the members of the Legislative Council to ask questions was being debated in connection with the subject of erecting a prison at the

<sup>39</sup> Vernon Smith, President of the Board of Control, speaking in connection with the implementation of the reports of the Law Commission in England, practically conceded the claim of the Legislative Council of India. He said, "Of course, that Council had the power to modify or reject any reforms, which might be suggested by the Home Government, but he should not tell his honourable and learned friend what course he would pursue in such a case until he knew what had actually passed in the Council . . . If the Legislative Council passed Acts, which, in his opinion, were prejudicial to the good government of India, he would annul those Acts; and if he could not induce this body to amend them, he would then, and not until then—not until he had exhausted every means—call upon Parliament to legislate upon the subject." Hansard (III Series), Vol. CXLVI, pp. 448-9.

<sup>40</sup> Sir Charles Jackson, Puisne Judge and member of the Council, observed on 15 December 1860, "From that time to this, the Home Government had never done more than suggest to this Council the propriety of any measure they may wish to pass." Proceedings of the Legislative Council of India, 1860, p. 1367.

<sup>41</sup> See pp. 142-3 above.

Nilgiris for the detention of European convicts, some members pleaded that the discussion should not be proceeded with as the constitutional issue had been referred to the Secretary of State for India. The majority of the members of the Council, however, held that the latter had no power to construe the statutes of Parliament for the Council and they should act according to their own understanding of the law.<sup>42</sup>

*Day-to-day Relations between the Council  
and the Authorities in England*

There was nothing new in the Legislative Council's claim to freedom of action in the field of legislation, subject to the veto and other restrictions imposed by Parliamentary statutes upon its authority: it was just a firmer reiteration of the stand taken in the preceding period. What is significant in the present period is that in the new set-up the independence of the Council became more or less an established fact in the day-to-day work of legislation. It was no longer the practice to refer, on one ground or the other, almost every important question to the authorities in England. Only those projects which required their prior sanction before enactment were formally referred to them.

There was, however, no interruption in the steady flow of information and exchange of views between the Council and the authorities in England. The proceedings of the Council and connected papers were regularly and without much loss of time transmitted to England, and they provided the Court of Directors and the Secretary of State for India adequate information for the proper discharge of their constitutional obligations. The views and sentiments of the latter on the various measures pending before the Council or passed by it were contained in their Legislative Despatches, which were as a rule placed on the Council's table. Relevant extracts from the despatches in other Departments were also communicated to the Council whenever necessary. There was not,

<sup>42</sup> Speeches by Sir Barnes Peacock, Laing and Sconce, Proceedings of the Legislative Council of India, 1861, pp. 143-67. See also pp. 145-6 above.

however, the same closeness of contact and intimacy of relationship as subsisted between them earlier.

Except when the question of the relative powers of the Legislative Council and the authorities in England obtruded into the debates, the relations between them may be said to have been, on the whole, normal and smooth. The Council cannot really be accused of playing at independence in the actual handling of measures regardless of their merits. The Court of Directors and the Secretary of State too cannot be held guilty of any unreasonable and excessive use of their special powers. The only case on record wherein the Legislative Council declined to carry out the orders of the superior authority was in respect of the Administrator General's Act of 1855. Here, strong political feelings appear to have been at work, and there was, indeed, as much sound reason to support the stand of the Directors as that of the Council.

Under the special power of control vested in the authorities in England, apart from the partial veto applied to Act VIII of 1855 respecting the office of the Administrator General, only two measures duly enacted by the Council were vetoed. The first one was Act VI of 1856, a measure for granting exclusive privileges to inventors. It was vetoed on the ground that it should have been enacted only after obtaining the previous sanction of the Crown as it affected the royal prerogative. In enacting this measure the Council traversed uncertain and dangerous ground without sufficient justification. The question of grant of patents had engaged the attention of the Government of India right from 1835, but it had refrained from legislating on the subject in the preceding period only because of the uncertainty of its competence to do so. Section 27 of the Charter Act of 1853 had been specially incorporated to remove this uncertainty. It enabled the Legislative Council of India to pass laws on any subject affecting the royal prerogative with the previous sanction of the Crown. As the Court of Directors rightly observed, "In passing Act VI of 1856, the Legislative Council departed from the course specially indicated for its guidance by the Imperial Legislature, and adopted one which, if within the competency of the Council at all, was as much so at the

commencement, as at the close, of twenty years' discussion upon the subject".<sup>43</sup> Sir Barnes Peacock, the Fourth or Legal Member of the Government of India, expressed his disagreement with the legal advisers in England, on whose advice the Court of Directors acted.<sup>44</sup> But the measure was promptly repealed by Act IX of 1857 and replaced by Act XV of 1859 after obtaining the previous sanction of the Crown.

Act XVI of 1859 was also vetoed, a measure affecting the administration of the estate of the late Nawab of the Carnatic. In brief, the facts of the case concerning the enactment were as follows. On the death of Ghulam Muhammad Ghaus, the Nawab of the Carnatic, in 1855, his title and dignity were not allowed to descend to his successor, and the revenues enjoyed by him during his life-time lapsed to the Government. The settlement of the claims of his creditors proved to be a tough problem. A number of his debts had been contracted at an exorbitant rate of interest, and quite a few by his uncle Prince Azim Jah acting as Regent during his long minority from 1825-42. It was believed that the

<sup>43</sup> Leg. Letter from Court, 15 March (No. 2) 1857. Also, Leg. Letter from Court, 2 January (No. 1) 1857, transmitting the opinion of the Attorney and Solicitor General in England.

<sup>44</sup> Legislative Proceedings of the Council of India, 1857, pp. 246-53. In passing the original measure, it may be noted that the Council was well aware of the doubts entertained in certain quarters as to its competence to enact such a measure without the prior sanction of the Crown. Explaining the conduct of the Council on this occasion, Sir Barnes Peacock observed, "As one of the committee [which settled the Bill] he thought at the time that, if the Act did not affect the prerogative of the Crown, it would be better not to send it home for sanction—not because he wished that the Council should run any unnecessary risk of exceeding its powers, or that it should assert a right to pass such an Act without the previous sanction of the Crown; but because he thought that, as the Act was introducing into India for the first time the right to grant exclusive privileges to inventors, it would be necessary for the Council to watch the mode in which it worked, and to have the power, if it saw any inconvenience arise from any of the provisions, to amend it at once without making a reference home." *Ibid.*, p. 247. The legal stand taken by Peacock and the Council was, on a later occasion, supported by Sir J. W. Colville, Chief Justice of the Supreme Court at Calcutta. *Ibid.*, 1858, p. 496.

property left behind by the Nawab would not be enough to meet in full the claims of the creditors, who were mostly Englishmen. The Government felt that it was under a moral obligation to safeguard the interests of the creditors, since many of them had lent "in full reliance that the dignity would descend, supported by its accustomed revenues", and it undertook to pay all *bona fide* claims to the extent of the actual sums advanced, together with 6 per cent. interest on them. Act XXX of 1858 was passed to provide for the administration of the estate of the late Nawab and for the settlement of all claims against it in the spirit of the Government's offer but without prejudice to the legal claims of the creditors. In the administration of the Act, a question arose whether the Government was bound to pay the debts incurred by Prince Azim Jah in the name of the minor Nawab even where the moneys were not used for his benefit. The Madras Supreme Court held that for a valid contract it was enough that the Regent had pledged the name of the Nawab, and it was not necessary for the creditor to prove that the debt had been incurred properly and necessarily for his benefit. The Legislative Council, however, felt that its intentions in passing the measure had been misconstrued, and it passed a declaratory law (Act XVI of 1859) without giving an opportunity to the parties adversely affected to present their side of the case.<sup>45</sup> The amending enactment laid down that the debts in question should not be deemed to have come within the meaning of Act XXX of 1858 unless it was proved that they were necessarily and properly contracted for the use of the late Nawab. The burden of proof was clearly cast upon the creditor. This departure from the ordinary canons of justice was defended on the ground that the Government's offer was *ex gratia* and it was free to impose such conditions as it considered necessary to prevent fraudulent claims being entertained. The enactment of the measure caused deep dissatisfaction among many of the creditors of the late Nawab, and also called forth a severe observation from the Chief Justice of the Supreme Court at

<sup>45</sup> Papers of Acts XXX of 1858 and XVI of 1859. Also, Proceedings of the Legislative Council of India, 1858, pp. 120-4, and *ibid.*, 1859, pp. 409-28.

Madras.<sup>46</sup> When the measure reached England, together with the representations of the interested parties, Sir Charles Wood vetoed it on the ground that although it professed to be only a declaratory law, it had in fact introduced a new element of proof, not warranted either by justice or policy. The measure was repealed by Act XXXVII of 1860 and replaced by Act XXXVIII of the same year, taking due note of the objections which had been raised.<sup>47</sup>

Apart from these cases wherein the veto was actually applied, the threat of its application deterred the Legislative Council from proceeding with two other measures. The first one was a Bill taken up in 1858 on the motion of H. Forbes, the member for Madras, and it sought to reintroduce oaths in judicial proceedings, which had been abolished by Act V of 1840. It was a highly controversial measure with a long history. In their report on civil procedure, the Law Commissioners in England had gone into the question again, and had expressed the view that all oaths and affirmations should be dispensed with. The members of the Legislative Council were far from agreed, and the question had been referred for eliciting the opinion of the Local Governments and of the public generally. At this stage, a despatch was received from the Secretary of State in which "there was a very clear indication that the measure was not in accordance with the views entertained by the Government at Home, and there was a probability that, even if it became law in India, the Secretary of State would exercise regarding it his undoubted right of

<sup>46</sup> The Chief Justice observed, "This consideration leads me out of our ordinary province, which is merely to expound the law as we find it, and not to remark upon its general character and policy. But called upon as I am under the peculiar circumstances of this case, I am bound to declare my opinion that the legislation complained of is of the grossest *ex post facto* character, and that it violates the first principles of legislation and justice." *Ibid.*, 1859, p. 786. The Legislative Council considered the observation to be uncalled for and out of jurisdiction, and the report of the Select Committee on the subject was forwarded to the Secretary of State for India. *Ibid.*, 1859, pp. 782-90 and *ibid.*, 1860, pp. 177-216.

<sup>47</sup> *Ibid.*, 1860, pp. 923-38. Also, Papers of Acts XXXVII and XXXVIII of 1860.



veto".<sup>48</sup> In view of this development, Forbes saw no point in pursuing the Bill and withdrew it with the permission of the Council.

A similar situation arose in 1860-61.<sup>49</sup> The Lieutenant Governor of Bengal approached the Legislative Council for a temporary measure to avert the threatened ruin of the indigo industry by the organised and large-scale breaking of their contracts by the cultivators. Act XI of 1860 was passed accordingly, instituting summary trials in such cases and making the breach of indigo contracts as well as instigation to break them penal offences. The same Act also set up a commission of enquiry to report on the whole subject.<sup>50</sup> The Commission was divided in its opinion. The minority expressed the view that there should be a permanent law for punishing instigation of affrays and for making breach of an indigo contract a penal offence, while the majority were decidedly against the adoption of these exceptional measures. C. Beadon, a member of the Executive Council, introduced the Breaches of Contract (Agricultural Produce) Bill, embodying the recommendations of the minority and extending the measure to cover contracts in respect of all agricultural produce. The second reading of the Bill was passed with 7 votes to 2, the members of the Executive Council voting solidly in favour of the measure.<sup>51</sup> Act XI of 1860 and Beadon's Bill, which was stigmatised as the "Slavery Bill", were both strongly opposed by the Indian community, and the Government was accused of undertaking class legislation to protect European plantation interests. Sir Charles Wood and his Council in England had the strongest objection to a breach of civil contract being made a penal offence. The step was clearly retrograde as it sought to annul the great reforms of the

<sup>48</sup> Proceedings of the Legislative Council of India, 1859, p. 485.

<sup>49</sup> *Ibid.* Also, *ibid.*, 1858, pp. 747-54.

<sup>50</sup> *Ibid.*, 1860, pp. 289-308. Papers of Act XI of 1860. For a good contemporary account of the indigo disturbances and the report of the Commission, see *Calcutta Review*, Vol. XXXVI, pp. 275 & 344.

<sup>51</sup> Proceedings of the Legislative Council of India, 1861, pp. 84-97 & 178-242.

forties of the century. It went also against the deliberate judgement of the first Indian Law Commission and the spirit of the Penal Code, which had been recently passed. In his despatch of 24 July 1860, Wood intimated to the Government of India his disapproval of Act XI of 1860, and he made it clear that he was not vetoing it only because the life of the measure was limited to the indigo season of that year only.<sup>52</sup> When he was faced with Beadon's Bill, he advised in his despatch of 18 April 1861 that the measure should not be proceeded with.<sup>53</sup> The Legislative Council did not, however, drop the Bill. The Select Committee on the Bill tried to amend it so as to bring it within the framework of civil procedure. Before the Committee could report, the life of the Council came to an end. Early in 1862, a fresh Bill based on the ideas entertained by the members of the old Select Committee was introduced in the new Council. It made provision for imprisonment in a civil jail with or without hard labour. Although many of the members of the Council were in favour of the Bill, it could not survive the scathing criticism of Sir Henry Maine, the new Legal Member, who considered it a very obvious and futile attempt to escape the Secretary of State's threatened veto.<sup>54</sup>

It is evident from this study that the members of the Executive Council were as keen as the additional members on maintaining the independence of the Legislative Council. In the case of every one of the measures that was objected to by the authorities in England, the former were as deeply committed as the latter. Even in the case of the grant to the descendants of Tipu Sultan which brought the Executive Council into loggerhead with the Legislative Council, both were equally critical of the action of the Secretary of State

<sup>52</sup> Algerton West, *Sir Charles Wood's Administration of Indian Affairs from 1859-66* (London, 1867), pp. 44-5.

<sup>53</sup> *Ibid.*, pp. 53-4. Also, Sir Charles Wood's speech in Parliament on 19 April 1861, Hansard (III Series), Vol. CLXII, p. 821.

<sup>54</sup> Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations. Vol. I, 1862. pp. 18-20, 32-50 & 197-215.

for India. Another point of constitutional significance emerges from this study. The independence of action claimed by the Legislative Council and the uncertainty of the scope of the power vested in the authorities in England did not cause as much inconvenience in the long run as they appeared to do at certain critical moments. Indeed, the supposed weak spot of the constitutional system may even be considered to have been a source of strength. While on the one hand the Legislative Council of India could refuse to be dictated as to what laws it should pass, the Governor General could on the other refuse his assent and prevent the measures passed by the Council from coming into force, and the Court of Directors and later the Secretary of State for India could veto laws duly enacted in India and order their repeal. Each of these acted as a valuable check on the other. This perhaps explains why the system continued without any significant change right up to the constitutional reforms of 1919.

*C.—Reservations by Parliament in the Grant of Legislative Authority: Practical Working*

From a study of the nature and extent of control exercised by the authorities in England over the legislative activities of the Government of India, we shall now pass on to examine another aspect of their relationship, namely, how far Parliament's reservations in delegating authority to the Legislative Council of India proved satisfactory and what changes were found necessary in the light of experience. While the question of constitutionality was decided ultimately by the courts of law, the Council had to make up its mind every time a measure came up before it as to whether it had the power to legislate. The ambit of its activities depended in the first instance upon its own understanding of the law. During the period of the 1833 Charter, whenever there was room for doubt, the Government of India came to a decision in close consultation with the Court of Directors. In the subsequent period, no references were generally made to England on these matters.

Of the various limitations on the legislative jurisdiction of the Government of India, the one that gave rise to the greatest

doubt and was felt to be most restrictive was the proviso to Section 43 of the Charter Act of 1833 that no law affecting in any way any of the prerogatives of the Crown should be passed in India.<sup>55</sup> According to a liberal interpretation, it only restrained the Government of India from doing anything, directly or indirectly, to prevent the Crown from exercising its prerogative rights or to bring their exercise into contempt. The Government of India could, without infringing in any way the spirit or the letter of the law, effect by legislation what the Crown could do in exercise of its prerogative. The proviso had been introduced, according to this view, only to prevent the plenary powers of legislation conferred by the substantive part of the section being interpreted "as empowering the Supreme Government to make laws as entirely irrespective of the Crown and Legislature of Great Britain as that of France". If this view of the law, which was put forward by the Attorney and Solicitor General and the Company's Standing Counsel in England and accepted by the Court of Directors as early as 1839,<sup>56</sup> had prevailed, the authority of the Government of India would have been greatly extended in an important direction. But it did not gain general acceptance in India and the policy pursued in this matter followed an uncertain course.

Grant of patents was one of the subjects that impinged on the royal prerogative, and it came up for consideration very early during the period of the 1833 Charter. According to one view, the Crown had no prerogative right to issue patents in respect of countries acquired after the enactment of the Statute of 1801 by which the subject was regulated. According to another, ~~for~~ the Crown possessed the right, but its exercise was held in abeyance since the grant of a charter to the East India Company. The latter now possessed a delegated authority over the subject. A third view was that the Crown's

<sup>55</sup> 3 & 4 Wm. IV, c. 85, s. 43.

<sup>56</sup> Enclosure to Leg. Letter from Court, 3 July (No. 8) 1839. This view was shared by many other eminent lawyers: C. H. Cameron's minute dated 26 June 1846, Leg. Dep., Original Consultation, 4 July 1846, No. 7; C. R. M. Jackson's minute, dated 18 November 1851, Leg. Dep. Pros., 7 May 1852, No. 16; and the views of Sir Barnes Peacock and Sir James Colville cited in note on p. 246 above.

right was extant and active. The question was whether there was some means by which the Government of India could legislate upon the subject without infringing this right, for instance, by obtaining the previous assent of the Crown. On a reference being made to them, the Attorney and Solicitor General and the Company's Standing Counsel suggested in 1838 that the Government of India might enact laws for enforcing and protecting within British India patent rights already granted by the Crown. They felt that this course of proceeding "would avoid any conflict of speculative rights and secure every object of practical utility".<sup>57</sup> Most of the applications for the grant of patents during this period were for the extension of rights already enjoyed in Great Britain and the Colonies, and the Government of India would have done well in accepting the advice. The Fourth Member of the Council, Andrew Amos, however, questioned both the legal soundness and the practical utility of the suggestion, and no action was taken to give concrete shape to it.<sup>58</sup> Fresh references to the authorities in England in 1842<sup>59</sup> and 1849<sup>60</sup> failed to elicit a more favourable reply, and the first patent law of India was passed only after the restriction on the authority of the Government of India to legislate on prerogative matters was clearly and unequivocally removed by the Charter Act of 1853.

Another subject affecting the prerogative of the Crown that called for attention was the creation of corporations and

<sup>57</sup> Leg. Letter from Court, 28 December (No. 19) 1838. A similar opinion was expressed by the legal advisers in England in 1850, although on this occasion they considered an amendment of the statute a preferable course.—Leg. Letter from Court, 18 June (No. 10) 1850. See also Leg. Letters to Court, 19 October (No. 5) 1835 and 26 September (No. 12) 1836; and Leg. Dep. Pros., 12 October 1835, No. 9.

<sup>58</sup> Minute dated 5 February 1841, Leg. Dep. Pros., 1 March 1841, No. 5.

<sup>59</sup> Leg. Letter from Court, 1 February (No. 1) 1842.

<sup>60</sup> Leg. Letters to Court, 27 January (No. 3) 1849 and 21 February (No. 2) 1851; Leg. Letter from Court, 18 June (No. 10) 1850; and Leg. Dep. Pros., 4 July 1846, No. 8, 27 January 1849, Nos. 68-9, and 21 February 1851, No. 5.

grant of corporal rights. There was no difficulty in incorporating banking institutions by legislation as this power had been specifically conferred on the Indian Governments by Section 8 of 47 Geo. III, c. 68. The Bank of Bombay, the Bank of Madras and the Union Bank of Calcutta were established, and the Bank of Bengal was given a new charter, in exercise of this power.<sup>61</sup> It was, however, doubtful if the power could be exercised in respect of other institutions. In 1838, the Government of India passed an Act to incorporate the Bengal Bonded Warehouse Association without consulting the Court of Directors. On receiving a copy of the enactment, the latter referred it to its legal advisers. The opinion tendered by them was that "the creation of a corporation by an act of the Legislative Council" was valid and the same authority had the power to limit the liability of the members of a trading association to the same extent as the Crown could limit under 7 Wm. & 1 Vict., c.73.<sup>62</sup> Although the soundness of this view was contested by other eminent lawyers, the enactment became a valuable precedent,<sup>63</sup> and the Government of India passed other laws of the same type, e.g., Act XIX of 1845 to incorporate the Assam Company and Act XLIII of 1850 for the regulation of joint stock companies. Indeed, even after the enactment of the Charter Act of 1853, which provided that measures affecting the royal prerogative might be enacted in India with the previous sanction of the Crown, the Legislative Council preferred to act on the strength of this precedent. Act IV of 1855 to renew the charter of the Assam Company<sup>64</sup> and Acts XIX of 1857 and VII of 1860

<sup>61</sup> Acts III of 1840, IX of 1843, XXIII of 1845 and VI of 1839 respectively.

<sup>62</sup> Leg. Letter to Court, 3 July (No. 8) 1839.

<sup>63</sup> Opinions expressed by C. R. Prinsep, Standing Counsel, Edward Lyall, Advocate General, and C. H. Cameron, the Fourth Member of the Council, in connection with Act XIX of 1845. Leg. Dep., Original Consultations, 21 April 1843, Nos. 56 & 58, and 31 May 1843, No. 8. Opinion of the Judges of the Supreme Court at Madras in connection with Act XLIII of 1850, Leg. Dep. Pros., 27 December 1850, No. 35.

<sup>64</sup> Note by Whitley Stokes, annexed to Sir Henry Maine's minute dated 31 August 1866. Government of India : *Legislative Department Minutes by Sir Henry Maine* (Calcutta, 1892), No. 47.

for amending the law relating to joint stock companies were passed into law without the prior sanction of the Crown. The Government of India thus exhibited greater boldness in this matter than in respect of the grant of patent rights.

The Government of India was not also sure of its competence to enact a law empowering the Supreme Courts to set at liberty a convicted person who had been recommended to the Crown for pardon on his own recognizance, and it passed Act VII of 1837 with the approval of the Court of Directors to make good the defect.<sup>65</sup> Later on, a reference was made to the legal advisers in England, and they held that the measure was *intra vires* of the powers of the Indian Legislature.<sup>66</sup> A more ticklish question was whether the Presidency Governments in India had the power to grant pardons, reprieves and remissions in respect of the judgements of the Crown Courts in the same way as in the case of the Company's Courts. In 1839 the Government of India suggested that the doubts entertained on the subject might be cleared up, if necessary, by Parliamentary legislation,<sup>67</sup> but no action was taken at the time. The subject cropped up again in 1853 when the competence of the Government of Bengal to remit sentences of imprisonment passed by the Calcutta Magistrates was questioned, and the matter was referred to the authorities in England.<sup>68</sup> The Charter Act of 1853 soon provided a way out of the difficulties, and Act XVIII of 1855 was passed with the previous sanction of the Crown to set all doubts at rest.<sup>69</sup>

Another question that cropped up was the Crown's right to fines, forfeitures and escheated properties. The charters establishing the Supreme Courts at Madras and Bombay had granted all fines and forfeitures arising out of their judgements

<sup>65</sup> Leg. Letters to Court, 15 February (No. 3) 1836 and 1 May (No. 10) 1837, and Leg. Letter from Court, 26 October (No. 2) 1836.

<sup>66</sup> Leg. Letter from Court, 19 February (No. 2) 1839.

<sup>67</sup> Leg. Letter to Court, 28 January (No. 2) 1839, and Leg. Dep. Pros., 3 December 1838, Nos. 34-6.

<sup>68</sup> Leg. Letter to Court, 2 June (No. 11) 1853, and Leg. Dep. Pros., 27 May 1853, Nos. 31-2.

<sup>69</sup> Statement of objects and reasons by Sir Barnes Peacock, 28 April 1855, Papers of Act XVIII of 1855.

to the East India Company, and the latter was free to remit them in particular cases. This had not been done in respect of the Supreme Court at Calcutta, and there was no authority in India that could remit the penalties imposed by it. The Government of India did not feel free to legislate on the subject as it touched the royal prerogative. The Crown came to the rescue and issued a Letter Patent in 1851 granting these proceeds also to the Company.<sup>70</sup> As regards escheats, difficulties cropped up when the Local Governments concerned intervened to provide for the proper administration of the funds of St. Mary's Church at Madras and the Cathedral Church of St. John at Calcutta. These were overcome in 1839 by the issue of a royal warrant foregoing the Crown's claims to the funds.<sup>71</sup> The Charter Act of 1853 finally provided a solution to these problems by granting the Company all fines, penalties, forfeitures, escheats and properties devolving *bona vacantia*,<sup>72</sup> and the Government of India as the agent of the Company was free to regulate the subject in any manner it thought fit.

And, lastly, a couple of questions concerning aliens and the subject of naturalisation, which seemed to affect the Crown's prerogative, also came up for consideration. In a case coming before it, the Supreme Court at Calcutta ruled that the British Crown held an absolute and complete right of sovereignty in India, and as a result the position of aliens in India was the same as in England. This ruling had far-reaching consequences. A large number of aliens were living in India for many decades and had acquired extensive properties. All these would lapse to the Crown under one of its ancient prerogatives. The Government of India sought the intervention of Parliament as the subject was beyond its purview.

<sup>70</sup> Leg. Letters to Court, 19 April (No. 2) 1850 and 30 September (No. 18) 1852; Leg. Letter from Court, 2 April (No. 8) 1851; and Leg. Dep. Pros., 7 May 1852, Nos. 2-22.

<sup>71</sup> Leg. Letter to Court, 8 August (No. 8) 1836, Ecclesiastical Letter to Court, 6 July (No. 4) 1836; and Ecclesiastical Letter from Court, 31 July (No. 2) 1839.

<sup>72</sup> 16 & 17 Vict., c. 95, s. 27.



This was, however, rendered unnecessary by the Privy Council's judgement in the well-known case of *Mayor of Lyons vs. the East India Company*, wherein it was held that the Alien Law did not extend to the Company's territories and a European alien could hold and devise lands in them.<sup>73</sup> The judgement also removed lurking doubts regarding the competence of the Government of India to enact laws in respect of the Parsis and other Asiatics permanently settled in British India.<sup>74</sup> But the relief was only partial and there was need for a law of naturalisation or denization. While grant of letters of denization was an ancient prerogative of the Crown, the subject of naturalisation was considered to fall within the legislative competence of the Government of India. Act XXX of 1852 was enacted accordingly to provide for naturalisation, subject to such restrictions as were considered necessary.<sup>75</sup>

The inconveniences experienced by the Government of India in not possessing the power to legislate in respect of matters affecting the prerogatives of the Crown were overcome by the grant of the necessary authority by the Charter Act of 1853, but the exercise of the power was subject to the approval of the Crown being obtained prior to legislation. The new Legislative Council often chafed against this limitation and considered it to be a hindrance to expeditious legislation in an important field.<sup>76</sup> The restriction was, therefore, dropped by the Indian Councils Act of 1861.<sup>77</sup>

Next to the prerogatives of the Crown, the definition of persons and places for whom the Government of India could legislate under Section 43 of the Charter Act of 1833 was

<sup>73</sup> Leg. Letter to Court, 1 August (No. 7) 1836, and Leg. Dep. Pros., 25 July 1836, Nos. 4-6, 3 October 1836, Nos. 12-3, and 26 June 1837, No. 1.

<sup>74</sup> Leg. Dep. Pros., 15 March 1850, Nos. 90 & 92.

<sup>75</sup> The Advocate General at Madras considered the measure to be in excess of the powers of the Government of India, but three successive Fourth Members of the Council—Bethune, Jackson and Peacock—did not think so. Leg. Letter to Court, 22 December (No. 21) 1852, and Leg. Dep. Pros., 16 July 1852, Nos. 1-19.

<sup>76</sup> See pp. 245-6 above. Also, papers of Act XX of 1860 relating to the baronetcy of Sir Jemsetjee Jejeebhoy.

<sup>77</sup> 24 & 25 Vict., c. 67, s. 24.

open to doubt in many respects. There was first the question of its competence to enact laws in respect of the territories acquired after 1833. While this section spoke of "the said territories" for which it could legislate, Section 1 defined the territories as those "now in the possession and under the Government" of the East India Company. The Government of India did not, however, take a restricted view of these provisions and passed a number of measures affecting territories acquired after 1833, e.g., Act XVII of 1844 relating to the lapsed State of Colaba. When the Advocate General of Bombay questioned the legality of the practice, the Fourth Member of the Council, Sir Barnes Peacock, took the stand that "by conferring the possession and powers of government over territories then in the possession and under the government of the East India Company, the Legislature necessarily conferred all powers incident to such possessions and government", and among these powers were the right to make war and peace and the right to hold and administer territories acquired by conquest or otherwise.<sup>78</sup> The Governor General's Council was divided on the issue.<sup>79</sup> On a reference being made to the Court of Directors, that body endorsed the stand taken by Peacock and advised the Government of India to stick to this view of the law.<sup>80</sup> No change was made in the relevant provisions by the Charter Act of 1853. Section 22 of the Indian Councils Act of 1861 also defined the legislative authority of the Indian Legislature as extending over the Indian territories "now under the Dominion of Her Majesty". The inadequacy of this expression was at last recognised by Section 2 of the Indian Councils Act of 1892, which inserted the words "or hereafter" after the word "now" in the section cited above.

<sup>78</sup> Leg. Dep. Pros., 11 July 1852, No. 47.

<sup>79</sup> Sir F. Currie and J. Lewis recorded their disagreement with the views of Peacock. *Ibid.*, Nos. 40 & 41. C. R. M. Jackson, the previous Fourth Member, had also questioned the legality of the existing practice. Leg. Dep. Pros., 27 August 1852, No. 17. See also Leg. Letter to Court, 16 July (No. 13) 1852.

<sup>80</sup> Leg. Letter from Court, 17 November (No. 19) 1852. Act VIII of 1853, the passage of which had been held up by this controversy, was enacted after the receipt of the Directors' instructions. Leg. Letter to Court, 3 March (No. 2) 1853.

Legislation in respect of the non-Regulation areas was another subject that posed a delicate problem. The competence of the Governor General in Council to make laws for them in his legislative capacity in the same way and to the same extent as for the rest of British India was not in doubt.<sup>81</sup> But a practice had developed by which the legislative needs of these areas, including the levy of fresh taxes, were attended to by the executive government, and the Legislative Council was *de facto* pushed out. Whatever its justification from a political standpoint, many eminent authorities held that this development was not warranted by law.<sup>82</sup> While the subject was one which concerned the relative powers of the executive and the legislature, it did not give rise to any serious conflict during the period of the Charter Act of 1833, since the two organs were nearly the same in composition at the time. The encroachment was felt more deeply in the subsequent period,<sup>83</sup> and strong views against this policy were expressed by many of the members of the Legislative Council at the time of the passing of the Indian Income Tax Act of 1860.<sup>84</sup> To remove the doubts entertained on the subject, the Indian Councils Act of 1861 declared that no rule, law or regulation made for these areas in the past should be deemed invalid by reason of its not being in conformity with the legislative provisions of the Charter Acts of 1833 and 1853,<sup>85</sup> and for the future the executive was to refrain from legislating for the unsettled or

<sup>81</sup> See p. 270 below.

<sup>82</sup> While C. H. Cameron considered the practice perfectly legal, a contrary view was held by A. Amos, J. E. D. Bethune, Sir Barnes Peacock and Sir Robert Peel. Minute by Amos, dated 2 July 1839, Leg. Dep. Pros., 25 November 1839, No. 6; minute by Peacock, dated nil, Leg. Dep. Pros., 16 July 1852, No. 47; and note by F. J. Halliday, dated 19 January 1852, *ibid.*, No. 39.

<sup>83</sup> Cameron urged before the Select Committee of Parliament that the doubt should be cleared up, but the Charter Act of 1853 was silent on the subject. Parl. Papers, H. L. No. 88 of 1852, Q. 2130-1.

<sup>84</sup> Proceedings of the Legislative Council of India, 1860, pp. 733-41. In pursuance of the view that what had been done in the past was not legal, Section 244 of the Act indemnified all officials for anything done by them with regard to the levy of taxes under the orders of the Government.

<sup>85</sup> 24 & 25, Vict., c. 67, s. 25.

non-Regulation areas.<sup>86</sup>

The question of the limits of the extra-territorial jurisdiction of the Government of India in legislative matters also presented many doubts and difficulties. To begin with, the Charter Act of 1833 contained no provision conferring specifically the power to legislate for the high seas, and it was doubtful if the power could be claimed on any other basis. The first Law Commission drew attention to the many difficulties caused by the absence of this power. Under the existing law only the Supreme Courts exercised admiralty jurisdiction, and the Government of India had no authority to empower the Company's Courts in the mofussil areas to punish even the most petty crime committed by its subjects on the high seas. It was also difficult for the Government to enforce the law governing prevention of smuggling and communication of infectious diseases.<sup>87</sup> On the matter being referred to the Court of Directors, the advice of the Attorney and Solicitor General and the Company's Standing Counsel was sought. "We think", they observed, "that the Legislative Council has power . . . to provide for the trial and punishment of crimes and offences committed upon the high seas, enacting and declaring them to be offences of the same quality and triable and and punishable as if they had been committed on land, as has been done as to offences committed at sea by British statutes. It would be of course proper to limit the application of such a law to persons, natives and subjects, owing obedience to the laws of the British territories."<sup>88</sup> On the receipt of this opinion, the Fourth Member of the Council, A. Amos, expressed his disagreement with it, and also pointed out that the lawyers in England had not started over what part of the sea adjacent to the continent of India the legislative authority of the Government of India extended. On a reference being made to them, the Advocate General and the judges of the

<sup>86</sup> Government of India: *Legislative Department Minutes* by Sir H. S. Maine (Calcutta, 1892), No. 69.

<sup>87</sup> Letter from the Indian Law Commissioners forwarding the Penal Code, 2 May 1837, paras. 30-1. Parl. Papers, H. C. No. 673 of 1837-38.

<sup>88</sup> Enclosure to Leg. Letter from Coult, 19 February (No. 2) 1839. See also C. Ilbert, *The Government of India* (Oxford, 1898), p. 443.

Supreme Court at Calcutta expressed the view that the Government of India had legislative authority only in respect of the maritime territory of the Company's possessions. In the light of the opinion expressed by the judges in particular, the Government of India did not consider it safe to undertake legislation on the lines indicated by the Crown and the Company's Counsels.<sup>89</sup> The subject lay simmering for a time, and cropped up again in 1848 in connection with a measure to punish certain offences committed within the limits of the Company's maritime territory. The Court of Directors gave its consent to the enactment of the measure, observing that it would be "sufficient to meet the cases which have ordinarily to be provided for".<sup>90</sup> In the meanwhile, J. E. D. Bethune took over as the Fourth Member. He took the stand that the opinion expressed by the lawyers in England was quite sound and there was no need for a conservative approach. The draft that he put forward, however, made no progress as the subject got linked up with the enactment of the penal code.<sup>91</sup> At the time of the enactment of the Charter Act of 1853, the Government of India pressed for an amendment of the statute for conferring upon it authority to legislate for the high seas.<sup>92</sup> No relief was, however, obtained during the period under review.

Another aspect of extra-territorial jurisdiction that caused considerable concern related to the suppression of inter-state crimes such as *thugi* and dacoity, and also to the regulation of the conduct of the camp-followers and civil residents in cantonments established by the Government of India within the territories of the Indian States in subordinate alliance with the Company. In this connection, two questions came up for

<sup>89</sup> Leg. Letter to Court, 13 July (No. 16) 1840. In this letter, the Government of India observed, "As this opinion proceeds from those in whom the interpretation and administration of the law is vested, we have felt it to have an authority paramount over all others, even over that of the eminent lawyers cited by your Honourable Court."

<sup>90</sup> Leg. Letter from Court, 26 July (No. 14) 1848.

<sup>91</sup> Leg. Dep. Pros., 29 April 1853, No. 15.

<sup>92</sup> Leg. Letter to Court, 4 May (No. 6) 1853; and Leg. Letter from Court, 1 March (No. 7) 1854.

consideration and decision: firstly, whether and to what extent the Government of India could regulate by law the conduct of its subjects while resident outside its territories; and, secondly, what the precise legal position of the Indian States in subordinate alliance was—specifically, whether the Government of India possessed any authority to legislate for them or their subjects. After declaring that the Government of India may enact laws for all places, persons and things *within* the Company's territories, the Charter Act of 1833 provided that it might also legislate for "all servants of the said Company within the dominions of Princes and States in alliance with the said Company".<sup>93</sup> "This specification of a particular class", the first Law Commission observed, "would seem, according to ordinary rules of construction, to prove that Parliament did not intend to give the Governor General in Council the power of legislating for any person not of the particular class, or for any person who might be in the dominion of any Asiatic State not bound by a treaty of alliance to the Company".<sup>94</sup> Prior to the enactment of this statute, the Presidency Governments used to provide for the punishment of crimes committed by its subjects extra-territorially without their competence being called into question. Unless similar power was conferred upon the Government of India, the Commission considered that great difficulties would be experienced in the suppression of crime. It was also not in favour of according "sovereign" status to the Indian States in subordinate alliance with the Company, and wanted the legislative authority of the Government of India to be extended over them and their subjects, wherever necessary.<sup>95</sup> On a reference made to them through the Court of Directors, the Attorney and Solicitor General and the Company's Standing Counsel took a liberal view of the law. They observed, "The Legislative Council has power to pass laws enacting and declaring that crimes and offences committed in the territories of Princes or States in India adjacent to the British territories

<sup>93</sup> 3 & 4 Wm. IV, c. 85, s. 43.

<sup>94</sup> Letter from the Indian Law Commissioners forwarding the draft penal code, 2 May 1837, para 27, Parl. Papers, H. C. No. 673 of 1837-38.

<sup>95</sup> *Ibid.*, paras 28-9.

by persons, the natives, subjects of and owing obedience to the laws of such British territories, shall be liable to be tried and punished as if committed within the local limits of the British territories." They explained the proviso with regard to the servants of the Company in these territories as being "either perhaps unnecessary or as meant to remove all doubts as to the power to bind servants of the Company in the particular class specified, who might not be, as occasionally happened, either natives or subjects of the British territories or British subjects of Her Majesty".<sup>96</sup>

As in the matter of legislation concerning the high seas, there were many eminent authorities who contested the correctness of this opinion of the Crown and the Company's Counsels.<sup>97</sup> But the Government of India found it difficult to refrain from undertaking legislation in this field, because, at this time, *thugi*, dacoity and other similar crimes had become grave inter-state problems affecting both British and Princely India. It adopted measures which were not only in excess of its own authority, but of the British Parliament itself under the rules of international law. The first of them was Act XXX of 1836, which made membership of a gang of *thugs* "either within or without the territories of the East India Company" punishable with imprisonment for life with hard labour. The wordings were so wide that *thugi* committed outside the Company's territories by the subjects of the Indian States was equally punishable as that committed by the Company's subjects.<sup>98</sup> Act XXIV of 1843 for the suppression of gang

<sup>96</sup> Enclosure to Leg. Letter from Court, 19 February (No. 2) 1839.

<sup>97</sup> Opinion of Andrew Amos, Leg. Dep. Pros., 31 December 1838, Nos. 13-14. Opinion of Sir Barnes Peacock, Leg. Dep. Pros., 24 September 1852, No. 20.

<sup>98</sup> In his evidence before the Parliamentary Committee, C. H. Cameron observed, "When we passed the *Thuggee* Acts, there is no doubt that what we did was *ultra vires*. For the sake of convenience, we overstepped the power." Explaining the necessity for them, he further said, "It was necessary to provide for the offence of *thuggee* in other territories; they were very glad that *thuggee* committed there should be punished; but the words used for that purpose were so large that if any crime of *thuggee* was committed in France by a French subject, it would be punished by the Indian Courts, which would be contrary to the law of nations." Parl. Papers, H. C. No. 88 of 1852, Q. 2133-4.

dacoity was on the same lines as the *Thugi* Act. Act XVIII of 1843 was another exceptional measure under which sentences passed by the courts of the neighbouring Indian States in respect of *thugi* and dacoity could be carried out in British Indian jails.<sup>99</sup> The Government of India was fully conscious of the dangerous ground it was treading in enacting these laws and it was not prepared to extend them to other crimes.<sup>100</sup> Another measure of the same type as the *Thugi* Acts was Act X of 1839, which provided for the punishment of persons in the Straits Settlements for waging war, or abetting it, against neighbouring states at peace with the Government of India.<sup>101</sup> While these measures referred to particular crimes, Act I of 1849 was a general measure to provide more effectually for the punishment of offences committed in foreign states. In full acceptance of the advice tendered by the legal advisers in England ten years earlier, Section 2 of Act laid down, "All subjects of the British Government, and also all persons in the civil or military service of the said Government, while actually in such service, and for six months afterwards, and also all persons who shall have dwelt for six months within the British territories under the Government of the East

<sup>99</sup> With reference to the embarrassment felt in the enactment of this measure, C. H. Cameron observed that they should not be troubled in the work of legislation by the unsubstantial rights of Princes "who are nominally sovereign and really subject". He wanted Parliament to declare itself formally to be, as it was for some time substantially, "the paramount power and general conservator of the peace throughout India". "Until the theory of our Indian Government is thus accommodated to the practical exigencies of our position," he added, "we must do either without such useful laws as that now in question or we must overstep the limits of our legislative power, not only of such legislative power as we have by the 43rd Section of the Charter Act but of any legislative power which Parliament is ever likely to confer." Minute dated 21 July 1843, Leg. Dep. Pros., 26 August 1843, No. 38. See also *ibid.*, Nos. 39-42, and Leg. Dep. Pros., 3 February 1843, Nos. 22-4.

<sup>100</sup> Leg. Letters to Court, 13 November (No. 33) 1847, paras 6-11; and Leg. Dep. Pros., 17 June 1848, Nos. 8 & 23.

<sup>101</sup> The Fourth Member Amos recorded that this measure was in excess of the powers of the Indian Legislature, which had no power to legislate for offences not committed within the Company's territories. Leg. Dep. Pros., 31 December 1838, Nos. 13-14.



India Company, subject to the laws of the said territories, wherever apprehended, shall be amenable to the law for all offences committed by them within the territory of any foreign prince or state; and may be bailed or committed for trial as hereafter provided, on the like evidence as would warrant their being held on bail or committed for the same offence, if it had been committed within the British territories." The same principle was reiterated by Section 3 of the Indian Penal Code of 1860.

The Government of India also experienced great difficulties while legislating in respect of certain other matters which affected the territories and subjects of the Indian States, in particular, the administration of cantonments. It had undoubted authority over its own servants and also over the Company's Indian troops; there was a good case for making extra-territorial crimes by its own subjects punishable; but it could lay no claim to legislate for the Indian States, although their political subordination was an accepted fact. Fully conscious of the limitations of its authority, the Government of India sought to gain its objectives, not through legislation, but by entering into agreements and understandings with the States and through developing its political and paramountcy rights.<sup>102</sup> Parliament too was most wary in legislating upon the subject of extra-territorial jurisdiction, and the Charter Act of 1853 and the Indian Councils Act of 1861 effected no change in the law. It was only by the Statutes of 1866<sup>103</sup> and 1869<sup>104</sup> that the Indian Legislature was empowered to make laws for British subjects, European and native, within the territories of the Indian princes in subordinate alliance with Her Majesty.

Next to the doubts and difficulties surrounding the territorial jurisdiction of the Government of India, there was some uncertainty regarding its competence to legislate in respect

<sup>102</sup> Leg. Dep. Pros., 30 January 1847, Nos. 12-22; 2 November 1849, Nos. 1-7; 5 May 1849, No. 12; and 22 April 1853, Nos. 13-14. See also C. Ilbert, *The Government of India* (Oxford, 1898), pp. 452-63.

<sup>103</sup> 28 Vict., c. 17.

<sup>104</sup> 32 & 33 Vict., c. 98.

of allegiance to the Crown. In 1847, in connection with a Bill for the punishment of seditious attempts to tamper with the fidelity of troops, the Fourth Member, C. H. Cameron, raised the question whether the *whole* of the law of allegiance was outside the purview of the Indian Legislature, or whether only the enactment of a law affecting the allegiance of a subject *in fact* was prohibited.<sup>105</sup> As a measure of prudence, the matter was referred to the Court of Directors for guidance.<sup>106</sup> But, before the receipt of a reply,<sup>107</sup> on the advice of J. E. D. Bethune, the new Fourth Member, the Government of India took a broader view of its powers and passed the Bill into law as Act XIV of 1849.<sup>108</sup> Measures of a similar nature were enacted in the subsequent years without any objection being raised, namely, Acts III of 1855 and XI of 1856 to prevent merchants ships from encouraging and conniving at the fidelity of navy and army men respectively, and Chapters VI and VII of the Indian Penal Code of 1860 relating to offences against the State and the army and the navy.

Finally, there was the restriction that the Government of India should not make any law affecting the Charter Act of 1833, which was to be the basic measure governing the Company's Indian administration, earlier Parliamentary statutes for punishing mutiny and desertion of officers and soldiers, and any future enactment of Parliament. Apart from the existing restrictions, the scope of the legislative authority of the Government of India depended to a large extent upon the restraint exercised by Parliament in intervening in Indian affairs. A survey of Parliamentary legislation during the period shows that it was almost entirely confined to modifications in the system by which India was governed and to matters affecting India in common with the rest of the Empire. In one or two cases the Government of India tried to persuade

<sup>105</sup> Minute dated 4 June 1847, Leg. Dep. Pros., 3 July 1847, No. 19.

<sup>106</sup> *Ibid.*, Nos. 15-26. Also, Leg. Letter to Court, 3 July (No. 19) 1847.

<sup>107</sup> The Court of Directors promised to refer the matter to its legal advisers, but the reply of the Court, if any, is not available. Leg. Letter from Court, 17 November (No. 14) 1847.

<sup>108</sup> Minute dated 17 December 1848, Leg. Dep. Pros., 25 August 1849, No. 3. Also, *ibid.*, Nos. 1-28.

the authorities in England to leave matters to be legislated upon in India. The first was with regard to insolvent debtors in India. Parliament was periodically renewing the law on the subject, and 11 & 12 Vict., c. 21, consolidated and placed it on a permanent footing. The Government of India pointed out in 1843 that it had been entrusted "with the power of legislating in matters of far greater importance", and there was nothing in the subject to justify its exclusion "from the general authority of the local Legislature".<sup>109</sup> On the advice of its legal advisers, the Court of Directors turned down the request, pointing out that the interests of the English creditors of the debtors in question were involved, and it would not be "constitutional to give the Government of India any power of legislation on this subject which shall extend to acts to be done here or to consequences to result in this country from the Acts of the Indian Legislature".<sup>110</sup> Another proposal referred to the Mutiny Acts and Articles of War applicable to the European officers and soldiers of the Company's forces. While the Mutiny Acts and Articles of War concerning the Crown troops were enacted by Parliament annually, these measures concerning the Company's troops were permanently on the statute-book and were amended from time to time as necessity arose. The Government of India considered it highly desirable to extend to the Company's troops without delay the improvements effected by the Annual Mutiny Acts and Articles of War, and since Parliament was not likely to find time for the purpose, it suggested that the power to legislate on the subject might be delegated to it.<sup>111</sup> Nothing, however, came of the move.

Apart from the way in which it viewed these specific restrictions upon its powers, the Government of India was hesitant, during these years, to take a broad view of the wide powers conferred upon it by Parliament under Section 43 of the Charter Act of 1833. In 1851-52, a proposal to authorise the Sadr Court at Calcutta to make rules from time to time

<sup>109</sup> Leg. Letter to Court, 13 February (No. 3) 1843.

<sup>110</sup> Leg. Letter from Court, 30 May (No. 12) 1843.

<sup>111</sup> Leg. Letter to Court, 20 December (No. 30) 1844.

with the concurrence of the Governor General in Council in his executive capacity was turned down on the ground that the Indian Legislature was exercising only a delegated authority and an act of further delegation would not be a constitutional procedure.<sup>112</sup> Again, on an earlier occasion, J.E.D. Bethune proposed a Bill of Pains and Penalties for the punishment of Sir Thomas Turtun, Register of the Ecclesiastical Court at Fort William, who had been guilty of large scale defalcations, and against whom no criminal prosecution could be sustained. In putting forward the Bill, the Fourth Member claimed that the powers of the Legislative Council of India were "as large within the sphere of its operation as that of Parliament itself".<sup>113</sup> Lord Dalhousie, however, considered the claim presumptuous,<sup>114</sup> and the Bill was finally dropped. A broader view of the powers was taken in subsequent years. In 1878, in the case of the *Queen vs. Burah* in which the delegation of certain powers to the Lieutenant Governor of Bengal by Act XXII of 1869 was impugned, Lord Selborne gave a firm ruling that the Legislative Council of India had "plenary powers of legislation, as large and of the same nature, as those of Parliament itself," and within its allotted sphere it was not "in any sense an agent or delegate of the Imperial Parliament".<sup>115</sup>

To sum up, the legislative authority conferred on the Government of India by the Charter Act of 1833 was quite extensive to meet domestic needs, and the intervention of Parliament was limited to matters of imperial importance and

<sup>112</sup> Leg. Dep. Pros., 19 December 1851, Nos. 1-4, and 14 May 1852, Nos. 72-86.

<sup>113</sup> Minutes dated 8 March and 27 September 1848, Leg. Dep. Pros., 7 April 1849, Nos. 6 & 22.

<sup>114</sup> Lord Dalhousie's minute dated 9 January 1849, *ibid.*, No. 9. Writing to Hobhouse on 5 May 1849, Lord Dalhousie said, "Am I to ride the high horse, as the Hon. Mr. Bethune does, regarding the legislative powers of the Council of India and to hold that, for India, they are coequal with the powers of Parliament, even to the extent of passing a Bill of Pains and Penalties . . . ?" British Museum, Add. Mss., 36476, ff. 536-8.

<sup>115</sup> C. Ilbert, *The Government of India* (Oxford, 1898), p. 206.

to questions affecting the machinery set up for the governance of India. The reservations made by Parliament were not many, but even these proved cramping, especially in respect of matters affecting the royal prerogative or involving extra-territorial jurisdiction. Many of the difficulties which cropped up were overcome by a liberal interpretation of the statute with the acquiescence of the authorities in England and, at times, by consciously overstepping the law to meet exigencies of administration. When the restrictions proved insuperable and there was a strong case for their intervention, Parliament and the Crown came to the rescue, although the relief was often slow in coming. The period witnessed a considerable extension in the authority of the Indian Legislature even in respect of matters specially stated to be outside its sphere.

## CHAPTER VI

### SURVEY OF LEGISLATION, 1834-61

WE have so far considered the nature of the legislative machinery set up under the Charter Acts of 1833 and 1853 and the manner in which it worked. We shall now undertake a general survey of the legislative achievements of the period. The subject is considered under four broad heads: general administration; administration of justice and general legal reform; regulation of economic life and revenue administration; and religious, cultural and humanitarian reforms.

#### *General Administration*

*Regulation and non-Regulation Areas:* Prior to 1834 certain areas had been declared exempt from the general Regulations and were administered through Agents under executive orders. This distinction continued without change after that year, and newly acquired territories were placed in one group or the other as the circumstances of the case necessitated.<sup>1</sup> No legislation was considered necessary either to acquire new territories or to administer them as non-Regulation areas. However, the assistance of the Legislature was nearly always sought to bring newly acquired territories<sup>2</sup> and non-Regulation areas within the purview of the Regulations, e.g., Act XVII of 1836 in respect of the territories of Begam Samru which lapsed to the Company, and Act XXIII of 1858 in respect of Karnul, which was hitherto administered through an Agent. Legislation was considered necessary also to transfer Regulation

<sup>1</sup> This was often done by proclamation. But no proclamation or order of annexation was issued in respect of Sind and many other territories. Foreign Letter to Court, 8 March (No. 13) 1848.

<sup>2</sup> An exception to the rule was the case of Serampore, which was annexed to the Hooghly District by proclamation in 1846. The laws and Regulations of the Bengal Presidency were deemed to be in force in the town, although there was no law to provide for it. Note by F. J. Halliday, 19 January 1852, Leg. Dep. Pros., 16 July 1852, No. 39.

areas to the non-Regulation group, e.g., Act XXIV of 1839 in respect of certain parts of the Ganjam and Vizagapatam Districts, Act XI of 1846 in respect of Khandesh and Ahmednagar, and Act XXII of 1860 in respect of certain tracts on the eastern border of the Chittagong District.<sup>3</sup> The legality of administering the non-Regulation areas without the aid of the Legislative Council was often questioned, and the Indian Councils Act, 1861, put an end to the practice.<sup>4</sup>

*Military administration and maintenance of peace and order:* Parliament had reserved to itself the authority to legislate for the European officers and soldiers of the Company's army. In 1840, 3 & 4 Vict., c. 37., revised and consolidated the Indian Mutiny Acts, and subsequent revisions were effected in 1849 and 1857.<sup>5</sup> The Company's European troops were merged with those of the Crown in 1861.<sup>6</sup> As regards native officers and soldiers, the Government of India enacted Act XX of 1845, consolidating and making the Articles of War uniform in all the Presidencies. The Articles were revised and replaced successively by Acts XIX of 1847 and XXIX of 1861. In exercise of the powers specially granted by Parliament under 3 & 4 Vict., c. 37, Articles of War for the Indian Navy were provided by Acts XII of 1844 and XXVII of 1848. A number of other measures concerning soldiers and sailors and the administration of cantonments were also passed, which reflect the sustained effort of the Government of India to make the laws on the subject uniform in the whole of the Company's territories.

The Legislative Council was also called upon to adopt many special measures to put down serious and wide-spread disturbances which threatened the peace and tranquillity of

<sup>3</sup> Lord Hardinge turned down a proposal for a general law to arm the executive government to remove any area from the purview of the Regulations. He observed that it would be an anomaly for the Government in its executive capacity to have power "to suspend the authority and operation of those laws to which it is itself subject". Original Leg. Consultations, 19 May 1846, Nos. 4 & 6.

<sup>4</sup> See pp. 259-60 above.

<sup>5</sup> 12 & 13 Vict., c. 43, and 20 & 21 Vict., c. 66.

<sup>6</sup> 24 & 25 Vict., c. 74.

the country. Acts XXIII of 1836 and XXIV of 1839 suspended the operation of the general Regulations in the hill areas of Ganjam and Vizagapatam in view of the grave and continued disturbances there. The emergency created by the Moplah outrages was met by Acts XXIII and XXIV of 1854, V of 1856 and XX of 1859. The Revolt of 1857, which shook the foundations of British rule in India, called for firm measures in many directions. Acts XIV, XVI, XVII and XXV of 1857 and X of 1858 were passed for the punishment of military personnel guilty of desertion and mutiny and of persons guilty of incitement to commit such acts and other acts of rebellion. Acts XXVIII of 1857 laid down stringent rules for the first time to prevent unauthorised importation, manufacture, sale and possession of arms. The Passport Act (No. XXXIII) of 1857 was passed to keep strict control over the residence and movement of foreigners. Act XI of 1858 reimposed corporal punishment, and Act XXII of 1858 provided for the transportation of persons sentenced to imprisonment for three years and over, because the number of persons convicted for offences connected with the Revolt was very large and a large number of jails had been destroyed by the rebels. Act V of 1858 and other measures provided for the recovery of escaped convicts. Restrictions were clamped on the press by Act XV of 1857. The law relating to State prisoners was revised by Act III of 1858. Two other measures applicable only to the North-Western Provinces were passed in view of the particular happenings there: Act XX of 1858 provided for the recovery of land and other real property wrongly taken possession of during the disturbances, and Act XXIX of 1858 was passed to afford relief to persons who could not seek redress from the civil courts owing to the troubled conditions. The officers of the Government in all the three Presidencies were indemnified by Act XXXIV of 1860 for any illegal acts committed by them in suppressing the Revolt. Most of these measures were of a temporary character; but the upheaval left an indelible impression on future legislation in such matters as arms and passport regulations.



*Police, prisons and maintenance of law and order:* Next we come to laws concerning the police and jail administration and to special problems connected with law and order. Sir Robert Peel's police reforms of 1827 attracted great attention, and those interested in Indian administration wanted reforms to be introduced in this country also. On a review of the very valuable evidence collected by the Select Committees of Parliament in 1832, the Court of Directors instructed that reforms in police administration should be effected urgently and observed that no financial consideration should stand in the way of a change so urgently required.<sup>7</sup> A committee was appointed in Bengal to enquire into the subject, but no great changes were made in the system in force. In the beginning only a few piecemeal reforms were introduced. Act XXIV of 1837 made provision for transferring the police functions of the Commissioner of Revenue and Circuit to a Superintendent of Police, whenever such an appointment was made in respect of any part of the Presidency of Bengal. Act XX of 1835 empowered the Government of Bombay to invest Mahalkaris with police powers. Act XXX of 1837 invested Police Amins of Madras with all the powers of Tahsildars. The first big experiment in police reform was made in the newly conquered province of Sind. Drawing its inspiration from this experience, the Government of Bombay introduced major changes in the police administration of the Presidency, and Acts XXVII, XXVIII and XXIX of 1852 provided the legislative basis for them. The Torture Commission of 1855 focussed public attention on the shortcomings of the police administration in Madras, and reforms were introduced there under the provisions of Act XXIV of 1859. In 1860 the growing expenditure on the military police, and in particular the need for reorganising the Punjab Police, led to the appointment of a commission to make a comprehensive enquiry into the state of the police administration in the whole of British India. The bill prepared by the commission on the lines of the Madras measure was passed into law as Act V of 1861. The measures considered so far related only to the police forces outside the

<sup>7</sup> J. C. Curry, *The India Police* (London, 1932), p. 30.

Presidency towns. The laws concerning the police within these towns, and also in the Straits Settlements, were consolidated and placed on a sound footing by Act XIII of 1856, and the policing of the Madras port was provided for by Act XXVIII of 1858.

Prison reform in India may be said to begin with the appointment of an enquiry committee in 1836, of which Macaulay was a leading member. Its recommendations were strongly punitive in spirit and not in consonance with the present-day ideas of prison reform. Still, as the Indian Jails Committee of 1919-20, presided over by Sir Alexander Cardew observed, "Its advocacy of proper buildings and intra-mural employment laid the foundation for further progress, and its vigorous grasp of principle placed the subject of prison reform in India on a higher plane than might otherwise have been at once attained."<sup>8</sup> The report reflected "the whole Benthamite cast of mind".<sup>9</sup> Its recommendations required action mostly in the sphere of administration. Although it influenced Government's policy in later years, these were not adopted immediately. The only important enactment relating to prison administration in Bengal during the period was Act XVIII of 1844, which transferred the supervision of prisons from the Sadr Courts to the Magistrates and Joint Magistrates, subject to the direction and control of the District and City Judges and the Local Governments. A similar reform was effected in Madras and Bombay by Act VIII of 1856; the Sadr Courts were relieved of their responsibilities, and an Inspector General, acting under the immediate orders of the Local Government, was placed in charge of prison administration in each of these Provinces.

Apart from matters relating to police and prisons, the Legislative Council was confronted with many special problems connected with law and order. Among them were *sati*, human sacrifice and infanticide, and these are discussed later on in connection with social legislation. *Thugi* and gang dacoity, carried on by well-organised bands, presented a major problem

<sup>8</sup> Report of the Indian Jails Committee, 1919-20 (Simla, 1920), para 9.

<sup>9</sup> Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), p. 217.

to the Government, and inter-Provincial co-operation on the widest scale was necessary for suppressing them. While this was essentially an administrative problem, the assistance of the Legislative Council was required on a number of occasions. Act XIII of 1835 empowered the Sadr Faujdari Court of Bombay to direct the trial of a person for any offence by the court of any District without regard to the normal rules as to jurisdiction. Act XXX of 1836 made mere membership of a gang of *thugs*, either within or without the Company's territories, punishable with hard labour for life. This enactment and Acts XVIII of 1837 and XVIII of 1839 made it possible for any competent court anywhere in British India to try *thugi* cases as if the offence had been committed within the District; and *fatwas* or opinions from Muhammadan law officers were also dispensed with. The difficulties experienced in getting convictions in these cases led to the passing of Act XIX of 1837 which provided that no person was incompetent to be a witness by reason of any previous conviction in respect of any offence. Special measures were also taken against gang dacoity and other similar crimes which had assumed serious proportions. Act XXIV of 1843 was passed on the lines of the *thugi* Acts to cover gang dacoity. Act III of 1848 was passed to curb the activities of professional poisoners called *Dhaturias*; it declared that the term *thugi* included offences by persons habitually associated with others for lifting children and committing "robbery not amounting to dacoity". Act XI of the same year was passed for punishing members of wandering gangs of thieves and robbers, not covered by the term *thugs* and dacoits; but a lower degree of punishment was prescribed, namely, a maximum of seven years' imprisonment with hard labour. These special measures were not passed without opposition and a certain degree of heart-searching. Commenting on Act XXIV of 1843, the Court of Directors observed, "We do not withhold our sanction even of an enactment of so great severity for an object of such incalculable benefit to society as the effectual suppression of dacoity"; however, it warned the Government of India to be on its guard "against the abuse and oppression to which the systematic

and exclusive employment of approvers for the conviction of accused persons is necessarily liable".<sup>10</sup> Since the activities of the bands engaged in *thugi* and gang dacoity cut across political boundaries, the Legislative Council made offences committed outside the territorial limits of British India also punishable under Acts XXX of 1836 and XXIV of 1843, although its authority to enact them was doubtful. It was even obliged to go to the assistance of the neighbouring Indian States and hold in the British Indian jails persons convicted of these offences by the courts of those States. This was made possible by Act XVIII of 1843.

Of the other measures concerning maintenance of law and order may be mentioned Act I of 1849, which made a more effective and uniform provision for the trial of the Company's native subjects committing crimes beyond the limits of British India, and Acts VII of 1854 and XVII of 1856, which laid down the procedure for the apprehension and surrender of foreign fugitive offenders.

Control of the press was another important matter which had a bearing upon the maintenance of law and order. In 1823, arising out of the activities of James Silk Buckingham, the well-known editor of the *Calcutta Journal*, two Regulations were adopted in Bengal introducing a system of licences, "which took all the pith and manhood out of the journals of the day".<sup>11</sup> Lords Amherst and Bentinck, however, pursued a liberal policy, and the Bengal press enjoyed considerable freedom in practice. Restrictions similar to those in force in Bengal were imposed in Bombay in 1825, but Madras had no such laws. The question of removing the restrictions and introducing a uniform system of press law for the whole of British India was taken up for consideration in the time of Lord Bentinck, and the proposal assumed final shape and was passed into law as Act XI of 1835 during the acting Governor-Generalship of Lord Metcalfe.<sup>12</sup> The measure was immensely

<sup>10</sup> Leg. Letter from Court, 4 September (No. 21) 1844. Also, Leg. Dep. Pros., 20 February 1837, No. 6, and 19 June 1837, Nos. 4-13.

<sup>11</sup> J. W. Kaye, *The Life and Correspondence of Charles Lord Metcalfe* (London, 1854), p. 251.

<sup>12</sup> The Indian press was hardly of any importance at the time. "It

popular in India; but there was unexpected opposition to it from the Court of Directors, which was with difficulty restrained from vetoing it. There was a temporary going back on the policy of having a free press at the time of the Revolt of 1857, and the next major change in the press laws took place with the passing of the Press and Registration of Books Act in 1867.

*Local and municipal administration:* In our study of the laws relating to general administration, we finally come to the measures bearing upon local and municipal administration. The subject is of special interest as it is in this sphere we have the first significant steps in the training of the people of India in the mechanism of democracy. Most of the laws enacted during the period referred to the Presidency towns. Municipal government had commenced there as early as 1688 with the establishment of a corporation at Madras. The Charter Act of 1793 established in the Presidency towns a system of administration by the Justices of the Peace, European and Indian, and this lasted for many decades. During the forties of the period under review, attempts to reorganise municipal administration were made on the basis of associating elected representatives of ratepayers with commissioners nominated by Government.<sup>13</sup> The fifties witnessed comprehensive changes affecting all aspects of the administration. The rules governing conservancy and town improvement were revised and consolidated by Act XIV of 1856, "a very complete Conservancy Act"<sup>14</sup> which applied to the Presidency Towns and the Straits Settlements. Uniform rules for the collection of municipal rates and taxes were laid down by Act XXV of 1856. As regards the administrative set-up, separate laws were enacted in respect of these places—Acts XXVI,

was not the Indian press that he [Metcalfe] liberated, but the British press in India which exercised a 'cat and mouse' regime." Edward Thompson, *The Life of Charles Lord Metcalfe* (London, 1937), p. 317.

<sup>13</sup> Acts XXIV of 1840 and XVI of 1847 in respect of Calcutta, Act XXII of 1841 in respect of Madras, Act XI of 1845 in respect of Bombay, and Act IX of 1848 in respect of the Straits Settlements.

<sup>14</sup> S. W. Goode, *Municipal Calcutta—Its Institutions in their Origin and Growth* (Edinburgh, 1916), p. 24.

XXVII and XXVIII of 1856 in respect of Madras, the Straits Settlements, and Calcutta respectively, and Act XXV of 1858 in respect of Bombay. In all the Presidency towns, the administration was vested in three salaried Commissioners. The Local Governments appointed all the Commissioners in Madras and Calcutta; in Bombay, two of them were elected by the Justices of the Peace, while the third was nominated by the Government. In the Straits Settlements, provision was made for five Commissioners, three of them being elected by the ratepayers.

The development of the municipal system outside the Presidency towns was in the early years "haphazard without legislative sanction or centralised direction".<sup>15</sup> Act X of 1842 was the first legislative measure on the subject in Bengal. It provided for the establishment of popular municipal government in "any place of public resort or residence" on the application of two-thirds of the householders. The immediate object in view was to set up such administrations in places wherein Europeans were living in large numbers or which they frequented often.<sup>16</sup> Act XXVI of 1850, which applied to the whole of British India, empowered the Local Governments to set up popular administration in any township if there was demand for it from the people. Act XX of 1856 was another important measure on the subject. It revised the law relating to the appointment and maintenance of *chaukidars* in the townships of the Bengal Presidency, and also constituted Panchayats composed of three to five respectable persons to aid in the assessment of rates. On the whole, during the period under review, only halting and hesitant steps were taken to apply the consultative or representative principle in local and municipal administration, and the results were not satisfactory.

### *Administration of Justice and General Legal Reforms*

*Amalgamation of the Crown and Company Courts:* As noted earlier, Parliament wanted the establishment "at an early date"

<sup>15</sup> Hugh Tinker, *The Foundations of Local Self-Government in India, Pakistan and Burma* (London, 1954), p. 27.

<sup>16</sup> Leg. Letter to Court, 30 December (No. 33) 1842.

of "a general system of judicial establishments and police to which all persons whatsoever, as well Europeans as natives, may be subject".<sup>17</sup> This clearly involved the amalgamation of the two sets of courts. But the Court of Directors instructed that this step should be thought of only after comprehensive reforms had been introduced in other directions. For the time being attention was to be paid only to correcting glaring evils. In spite of this warning, the first Law Commission presented, in connection with the *lex loci* proposals, a plan for setting up a College of Justice, which was to form the basis of a unified judicial system. But this move proved infructuous. During the Charter discussions of 1853, the continuance of the two separate sets of courts was regarded to be symbolic of the Government's general failure to effect basic judicial and legal reforms. The transfer of the administration from the Company to the Crown and the enactment of the Codes of Civil and Criminal Procedure removed the hurdles in the way of amalgamation. In view of the importance of the measure and the delicate issues involved,<sup>18</sup> the Indian High Courts Act, 1861, which brought about the merger, was enacted in England.

*Judicial system of the Presidency towns and the Straits Settlements:* Since the courts of the Crown and the Company maintained their separate existence and administered different sets of laws during the whole of the period under review, there was need, in most cases, for separate legislation to meet their different and varying requirements. We shall first consider the laws concerning the former. There were no great changes in the constitution and powers of the Supreme Courts at the three Presidencies or of the Recorder's Court at the Straits Settlements. There was a proposal to abolish the latter as a measure of economy, but nothing came of it.<sup>19</sup>

<sup>17</sup> 3 & 4 Wm. IV, c. 85, s. 53.

<sup>18</sup> The competence of the Legislative Council of India to abolish the Supreme Courts, with or without the sanction of the Court of Directors or the Secretary of State for India, was questioned by many. Parl. Papers, H. C. No. 426 of 1852-53, Q. 2796 & 2888, and Hansard (III Series), Vol. CXLVI, pp. 427-33.

<sup>19</sup> See pp. 201-02 above,

Of the many measures of secondary importance, particular mention may be made of Acts XI of 1844, XXVIII of 1845 and XXI of 1847 in respect of Calcutta, Madras and Bombay respectively. To secure quicker despatch of business, these measures enabled the judges of the Supreme Courts to sit separately and out of term to dispose of criminal business. Act I of 1861 made similar provision in Bombay in respect of other kinds of business.

As regards the subordinate judiciary of the Presidency towns, the first Law Commission examined the subject in all its bearings, and recommended the setting up of Subordinate Civil and Criminal Courts in place of the existing Courts of Requests and Magistrates.<sup>20</sup> But the atmosphere was not favourable for extensive reforms, and the measures which came to be finally adopted were quite modest. On the civil side, Act IX of 1850 provided for the constitution of a Small Cause Court in each of the Presidency towns. Although provision was made for the appointment of three judges, one of whom was to be a barrister or advocate of the Supreme Court, a judge of the Supreme Court was to try all small causes for the time being. The pecuniary limit was fixed at only Rs. 500, one hundred more than that possessed at the time by the Calcutta Court of Requests, and the Court was not to entertain cases concerning revenue, libel or slander. On the criminal side, all that was done was to regularise and confirm by Acts XXI of 1839 and III of 1842 the trial of petty thefts and simple larcenies by a single Magistrate without the aid of a jury at Calcutta. These measures were extended to Madras by Act VIII of 1849 and to the Straits Settlements by Act XIV of 1850. In Bombay the powers of the Petty Sessions and single Police Magistrates were somewhat extended by Act III of 1841. Single Justices were enabled to act in criminal causes by Acts IV of 1835 and I of 1837 in Bengal and IX of 1849 in Madras. The number of Coroner's jurors in the Presidency towns was reduced from twelve to five by Act XXVI of 1848. The system of criminal justice in the Presidency towns and the Straits Settlements were completely overhauled by the Police

<sup>20</sup> See pp. 197-21 above.



Act (No. XIII) of 1856.

*Measures to reform the English law in force in India:* With the thirties of the last century a great age of law reform dawned in England, and the contrast between the English law as it prevailed there and that which prevailed in India became more and more glaring as years passed. The enactment of a general measure extending to India all amendatory British statutes applicable to the circumstances of the country was viewed with favour by many persons, and Lord Auckland expressed his willingness to give his assent to such a measure in respect of laws "affecting private rights in property inheritance".<sup>21</sup> The suggestion was, however, strongly opposed by A. Amos, the Fourth Member. He pointed out that it would invest the courts with unlimited discretion in matters which were essentially legislative in character.<sup>22</sup> The policy that was finally decided upon was to scrutinise each measure as it was passed by Parliament and adopt it with such modifications as the conditions of the country required.<sup>23</sup>

The reforms in the English law in force in India were based mostly, but not entirely, on the changes effected in England. In the field of penal law, Act XXXI of 1838, which embodied the provisions of several statutes passed in the first year of Queen Victoria's reign, was perhaps the most important measure, and its main object was to reduce the number of capital offences and to mitigate the rigour of the law. A number of important reforms were introduced concerning property, succession and inheritance. Act XXV of 1838 extended the benefits of the new Statute of Wills (1 Vict., c.26) to the wills of persons in India whose properties could be administered only after obtaining probates or letters of administration from the Supreme Courts. Act XXIX of 1839 extended to India the amendments

<sup>21</sup> Leg. Dep. Pros., 10 June 1939, No. 18. See also the letter from the judges of the Supreme Court at Calcutta, No. 9, and a note by the Hon. Sir H. Scaton, No. 10, *ibid*.

<sup>22</sup> Leg. Dep. Pros., 10 June 1839, Nos. 8 & 19.

<sup>23</sup> In 1852, Sir Erskine Perry, judge of the Supreme Court at Bombay, put forward a proposal similar to that made by Lord Auckland, but it did not find favour with the Government of India. Leg. Letter to Court, 30 September (No. 18) 1852.

to the English law of dower contained in 3 & 4 Wm.IV, c.105, and Act XXX of 1839 the amendments to the English law of inheritance contained in 3 & 4 Wm.IV, c. 106. Act XXIV of 1841, based on a number of English statutes passed during the preceding few years, was intended to secure "the greater uniformity of the law administered by Her Majesty's Supreme Courts with that administered in England in regard to the undisposed residue of the effects of testators, illusory appointments, the transfer of estates by persons under disabilities pursuant to the direction of courts and the better management of the property of such persons and other like matters".<sup>24</sup> Act XXXI of 1854 was an important measure for the abolition of real actions and also fines and common recoveries, and to simplify the modes of conveying land. Act XI of 1855 was intended to limit the liability to mesne profits and to secure to *bona fide* holders under defective titles the value of improvements made by them.

As regards the judicial procedure of the Crown Courts, its expensiveness, dilatoriness, and observance of antiquated forms had earned great notoriety and were sharply criticised by the Law Commission in a number of its reports; but its recommendations to remedy the defects were not acceptable to the judges of the Supreme Courts.<sup>25</sup> A number of reforms introduced in England were, however, adopted with certain modifications to suit the conditions in India. Acts IX of 1840, VII of 1844 and XV of 1852, supplemented by Act II of 1855, which applied both to the Crown and the Company Courts, effected important changes in the law relating to evidence. "These reforms made witnesses both competent and compellable, notwithstanding that they might have committed a crime, or were interested, or were parties, or the husbands or wives of parties to the case".<sup>26</sup> Acts V and VI of 1855 were important measures concerning execution of decrees, and Acts XVII of 1852 and VI of 1854 introduced major changes in equity

<sup>24</sup> Preamble to Act.

<sup>25</sup> See in particular the Commission's reports on the Recorder's Court at the Straits Settlements, the reform of the Courts of Requests in the Presidency towns, and the *lex loci* question. See pp. 195-201 above.

<sup>26</sup> G. C. Rankin, *Background to Indian Law* (Cambridge, 1946), p. 112.

procedure. The law relating to insolvent debtors in India which had been reserved for imperial legislation. was amended, consolidated and placed on a permanent footing by 11 & 12 Vict., c.21. Of the laws for the improvement of Criminal Procedure, Act XXII of 1839, framed on the principles of 6 & 7 Wm. IV, c.114, was an important enactment which enabled persons charged with offences to make their defence more effectually through counsel. Acts XXII of 1848 and VI of 1852 based on British statutes sought to put an end to the scrupulous niceties of the existing law which made it very difficult to secure convictions even in cases where guilt was patent.

*Judicial system outside the Presidency towns:* The laws relating to the constitution and powers of the Sadr Courts were not many, and referred mostly to the extension of their jurisdiction to newly acquired territories, e.g., Acts II of 1835, XV of 1836 and X of 1838. The reforms introduced in respect of the subordinate courts were, however, extensive and highly significant. The one great problem that the Government had to face was the ever increasing pressure of judicial business. There was urgent need for minimising delays in the administration of justice and also for bringing justice nearer home to the people. Some relief was obtained by improvements in procedure, but the real solution lay in the decentralisation of judicial authority and the appointment of more judges. In Bengal a great change was effected by the abolition of the system of Provincial Courts of Appeal and Circuit and the institution of the office of "the District and Sessions Judge".<sup>27</sup> A similar reform was effected in Bombay by Elphinstone's Code of 1827, and in Madras by Act VII of 1843. The most significant results were obtained by an increase in the number of uncovenanted Indian judges and by extending their jurisdiction and powers, reforms largely associated with Elphinstone and Bentinck. On the civil side, in Bengal, Regulation V of 1831 raised the pecuniary jurisdiction of the Munsiffs from Rs. 150 to Rs. 300 and of the Sadr Amins from Rs. 500 to Rs. 1 000; it also created a new cadre of Principal Sadr Amins

<sup>27</sup> Bengal Regulations I of 1829 and VII of 1831, and Act VII of 1835.

with a jurisdiction up to Rs. 5,000. Act XXV of 1837 empowered the latter to try all civil cases without any limitation as to value. Similar reforms were introduced by Regulation XVIII of 1831 in Bombay and by Regulation III of 1833 in Madras. Act VI of 1843 empowered the Munsiffs, the lowest class of Indian judges to entertain suits of all descriptions, excepting those in which they themselves, their relatives, or the *Vakils* (lawyers) and officers of their courts were parties. They could now try suits in which Europeans (British and foreign), Americans, Armenians, etc., were parties. Of the other measures may be mentioned Act V of 1836, which empowered the Principal Sadr Amins and Sadr Amins to execute the decrees of their own courts as well as those of the Sadr Diwani Courts in Bengal. A similar reform was introduced in Bombay by Act VII of 1851.

In the field of criminal justice, great difficulties were experienced in introducing similar reforms. As covenanted Assistants could not be spared to help the Zillah and Joint Magistrates in Bengal, Act XV of 1843 was passed for the more extensive employment of the uncovenanted agency, both on the revenue and the judicial sides, and this gave Indians their first important share in the administration of criminal justice in the province.<sup>28</sup> Acts XXXIV of 1837, XII of 1854 and VII of 1857 in respect of Madras and Act IV of 1851 in respect of Bombay were enacted to achieve the same object. These various changes in respect of civil and criminal establishments were revised and consolidated by the codes of 1859 and 1861.

The question of extending the jurisdiction of the Company's Courts over European British subjects attracted great attention during the period. The Charter Act of 1813 had laid down that the European British subjects residing, trading or holding property at a distance of more than ten miles from the Presidency towns were subject to the jurisdiction of the Company's Courts in civil matters "in the like manner as the

<sup>28</sup> By a Regulation of Lord Hastings in 1821, petty criminal cases could be referred to the Hindu and Muhammadan Law Officers and the Sadr Amins, but the arrangement was in force only for a short period.

natives of India". But the utility of the provision was very much diminished by the right of appeal from the decisions of these courts to the Supreme Court that was granted to them.<sup>29</sup> Moreover, under the old Regulations, Europeans and Americans were amenable to the jurisdiction of only those courts of the Company which were presided over by the European judges.<sup>30</sup> The first great step towards giving effect to the new policy was taken by Act XI of 1836. It removed the distinctions based upon birth or descent in respect of civil proceedings and enabled the Company's superior courts, including those presided over by the Indian judges, to try cases in which persons of European extraction were parties.<sup>31</sup> The principle was extended to the lower courts by subsequent enactments: Act XXIV of 1836 in respect of the Assistant Judges in Bombay, Act III of 1839 in respect of the Revenue Courts in all the three Presidencies, Act VI of 1843 in respect of the Munsiffs' Courts in Bengal, and Act III of 1850 in respect of the Sadr Amins and the District Munsiffs in Madras. Further, while passing such special measures as the one incorporating the Assam Company, care was taken to ensure that no exemptions were claimed from the jurisdiction of the Company's Courts.<sup>32</sup>

The efforts of the Government of India to effect a similar reform in the field of criminal justice in the forties of the last century proved infructuous owing to the stiff opposition of the European community. In framing the code of criminal procedure, the second Law Commission proceeded on the principle that no one should be exempt from the jurisdiction

<sup>29</sup> 53 Geo. III, c. 155, s. 107.

<sup>30</sup> Under Bengal Regulation IV of 1827, the District Judges could refer to the Sadr Amins, their Indian subordinates, cases in which Europeans and Americans were parties. The provision was repealed by Bengal Regulation V of 1831. W. H. Morley, *The Administration of Justice in British India* (London, 1858), p. 117.

<sup>31</sup> This great measure of reform was effected in the teeth of the opposition of the European community without a note of dissent in the Governor General's Council and with the full support of the Governments of Bombay and Madras. Leg. Dep. Pros., 3 October 1836, Nos. 1-5.

<sup>32</sup> Act XIX of 1845, s. 19.

of the courts on ground of colour or descent alone.<sup>33</sup> The Legislative Council of India was strongly in favour of the proposal.<sup>34</sup> But there could be no progress in the highly disturbed atmosphere of racial antagonism that prevailed after 1857.<sup>35</sup> A few minor improvements in the law governing the subject were, however, effected by Acts IV of 1843 and VII of 1853.

*General legal reforms:* For a correct appreciation of the course of legislation in this field, it is important to remember that during nearly the whole of the period under review the day-to-day work of legislation was carried on in the background of the vaster undertaking of general codification, which started showing results only at the close of the period. In the field of substantive criminal law, the great achievement of the period was the enactment of the Indian Penal Code, Act XLV of 1860, which was applicable to the whole of British India, excepting the Straits Settlements.<sup>36</sup> In spite of the prolonged controversies which preceded its passage, and the fears and forebodings of many persons, the code was, in the words of Sir James Stephen, "triumphantly successful".<sup>37</sup> Prior to its enactment, legislation mainly centred round day-to-day problems of maintaining peace, order and security: *thugi*, dacoity, indigo affrays, disturbances in Malabar, the Santal rebellion, the Revolt of 1857, etc. A few measures such as those relating to the abolition of slavery and the suppression of human sacrifice and infanticide were motivated by humanitarian considerations. For the rest, the only subject of basic importance which received great attention was that of corporal punishment. Bentinck did away with it in the Indian army, and also abolished it in respect of offences in civil life excepting by way of

<sup>33</sup> First Report of the Commission, Parl. Papers, C. 2035, p. 92.

<sup>34</sup> Proceedings of the Legislative Council of India, 1857, pp. 45, 129 & 143.

<sup>35</sup> *Ibid*, 1859, pp. 737-59; and *ibid*, 1861, pp. 366-403. Also, *The Calcutta Review*, Vol. XXXIV, p. 78.

<sup>36</sup> The code was later extended by Act V of 1867 to the Straits Settlements also.

<sup>37</sup> W. Stokes, *The Anglo-Indian Codes*, Vol. I (Oxford, 1887), p. 71. B. K. Acharya, *Codification in British India*. (Calcutta, 1914), p. 214.

jail discipline. Opinion was strongly divided on the wisdom and expediency of the step taken by him, and the Government's policy was very unsteady for years to come. Acts III of 1844 and I of 1853 reimposed the penalty in the case of juvenile offenders, and Act XX of 1845 reintroduced it for maintaining discipline in the Company's army. But whipping was not included as a punishment under the Penal Code of 1860.<sup>38</sup> A special Bill to authorise flogging in certain cases was passed by the Legislative Council in 1861. It did not, however, receive the assent of the Governor General.

As regards developments in civil law, there was some talk of codifying the personal laws of the Hindus and Muhammadans relating to marriage, succession and inheritance. But the immensity of the task and its delicate nature were soon apparent, and the second Law Commission was definitely against their codification.

The personal laws of the Parsis presented a peculiar problem. Unlike the Hindus and Muhammadans, the Parsis were subject to English law within the Presidency towns and to their own customary laws outside the towns. Not much practical inconvenience was felt from their subjection to English law so long as the hold of their caste *panchayats* was strong and all disputes among the members of the community were settled by them. The ludicrousness of applying the English law to inheritance among the Parsis became evident when cases came before courts of law for adjudication. On a representation made by the leaders of the community in 1835, Act IX of 1837 laid down that the immovable properties of the Parsis within the Presidency towns should be deemed, for purposes of inheritance, chattels and not freehold.<sup>39</sup> The question of a general revision of the law on the subject was taken up in earnest in 1855, and on the basis of a report submitted by a special commission in 1861, the Parsi Succession Act and the Parsi Marriage and Divorce Act, both of 1865, were passed.<sup>40</sup>

The Portuguese, Armenians, Anglo-Indians and Indian

<sup>38</sup> Proceedings of the Legislative Council of India, 1861, pp. 107-44.

<sup>39</sup> Leg. Letter to Court, 12 June (No. 8) 1837.

<sup>40</sup> D. F. Karaka, *History of the Parsis* (London, 1884), Chap. V.

Christians suffered from similar disabilities as the Parsis. The object of having a *lex loci* specially applicable to them engaged the attention of both the Law Commissions and the Government of India. But, it was not till 1865 that a law on the subject, namely, the Indian Succession Act, was enacted on the basis of the recommendations of the third Law Commission. This measure was applicable to all persons other than the Hindus, Muhammadans, Buddhists and Parsis.

In the field of judicial procedure, the enactment of the Civil Procedure Code (Act VIII of 1859) and the Criminal Procedure Code (Act XXV of 1861), framed on the basis of the reports of the second Law Commission, were the signal achievements of the period. These codes were applied at first only to the Company's Courts as no decision had been taken at the time of their enactment with regard to the amalgamation of the Supreme and the Sadr Courts, and they did not also extend automatically to the non-Regulation areas. But before long they were applied to the Presidency towns as well.<sup>41</sup> Another measure of great significance was Act XIV of 1859. In the words of W. Stokes, "It provided for one uniform law of limitation for all the courts in British India, except as to proceedings for the execution of decrees in the three Supreme Courts, and suits for public claims under Bengal Regulation II of 1805."<sup>42</sup> The question of laying down how prescriptive rights in property might be acquired was also considered in connection with this measure; but no law was enacted as it was felt that the circumstances of the country were not propitious for it.<sup>43</sup>

Prior to the enactment of these codes, great attention was paid to a number of matters concerning judicial procedure and one of them related to appeals. Act III of 1843 secured within the jurisdiction of each of the Sadr Diwani Courts a uniform system of interpretation by providing a special appeal to them

<sup>41</sup> The Civil Procedure Code was extended to the High Courts by Letters Patent in 1865. The revised Criminal Procedure Code of 1882 applied to the whole of British India.

<sup>42</sup> W. Stokes, *Anglo-Indian Codes*, Vol. II (Oxford, 1888), p. 943.

<sup>43</sup> *Ibid.* Also, Proceedings of the Legislative Council of India, 1854-55, pp. 544-54 & 600-11.



on all disputed questions of law, usage or practice.<sup>44</sup> The object of Act XVI of 1853 was to systematise and codify the law on special appeals. As regards regular appeals, Acts XV of 1853 and IX of 1855, which applied to the Sadr Diwani Courts of Bengal and Madras respectively, attempted to simplify and shorten the mode of procedure and pleading. A similar measure was not considered necessary by the Government of Bombay. Act IX of 1854 laid down that the decisions of the lower civil courts should not be interfered with on appeal on account of technical errors "not productive of injury to either party". As regards criminal appeals, following the practice in Bengal and Madras, Act XXXVII of 1837 put an end in Bombay to the exemption enjoyed by the special courts constituted to try offences against the State from the revisionary control of the Sadr Court.<sup>45</sup> Act XXXI of 1841 was a measure of wider significance. It sought to remedy the evil of multiplicity of appeals in criminal cases in Bengal and provided for "one trial and one appeal" only.

3 & 4 Wm. IV, c. 41, established the Judicial Committee of the Privy Council, and also made provision for the disposal of certain old appeals from India which had remained unattended for many years. Acts XI of 1839 and II of 1844 passed by the Indian Legislature referred largely to court fees in respect of appeals to the Privy Council. The difficulties involved in appeals to the Privy Council gave rise to suggestions for locating a final court of appeal within India, but there was not much support for the move.<sup>46</sup>

As regards the law governing evidence, the position was very fluid and uncertain in the beginning. A few rules in the old Regulations, the vague customary laws of the Muhammadans, and the practice in English courts as generally understood were the only guides which the Company's judges had.

<sup>44</sup> See p. 204 above.

<sup>45</sup> Leg. Dep. Pros., 25 September 1837, Nos. 3-6.

<sup>46</sup> Minute by C. H. Cameron, 21 March 1845, Leg. Dep. Pros., 5 April 1845, No. 7. Cameron's evidence before the Parliamentary Committee, Parl. Papers, H. L. No. 88 of 1852, Q. 2333. Also, Sir John Malcolm, *The Government of India* (London, 1833), p. 252.

Act XIX of 1853, passed in respect of the civil courts of Bengal, was the first major enactment relating to the law of evidence. Among other things, it abolished incompetency on the ground of interest or relationship or of being a party to the suit; it also laid down that evidence should be taken *viva voce* and written down by the judge, or under his direction, and signed by the witness. Act X of 1855 extended the principles of this measure to Bombay and Madras with such modifications as were considered necessary. Act II of 1855, which applied to all the courts in British India, made "a great many provisions of a useful character, modifying the English law but conceived upon English lines".<sup>47</sup> These three measures were practically the only rules on the subject before the passing of the Indian Evidence Act of 1872.<sup>48</sup>

Great difficulties were experienced in the issue of summons and execution of decrees outside the jurisdiction of the courts issuing them. Act XXIII of 1840 was passed to enforce attendance of persons resident within the local limits of the Supreme Courts as witnesses before the mofussil courts, and also to prevent evasion within these limits "of civil and criminal processes, as well as of arrest, punishment, and execution upon person, and upon property, issued from the mofussil courts".<sup>49</sup> Among other factors, the difficulties experienced in the execution of the judgments of the courts of one Presidency within the jurisdiction of those of another<sup>50</sup> led to the enactment of Act XXXIII of 1852, which was later explained and amended by Act XXXIV of 1855. These two enactments sought to settle

<sup>47</sup> G. C. Rankin, *Background to Indian Law* (Cambridge, 1946), p. 113. The Court of Directors hailed it as "the commencement of Indian legislation in regard to substantive law of evidence in the Company Courts". Leg. Letter from Court, 10 December (No. 2) 1856, para 21.

<sup>48</sup> W. Stokes, *Anglo-Indian Codes*, Vol. II (Oxford, 1888), p. 815.

<sup>49</sup> Leg. Letter to Court, 8 March (No. 4) 1841, paras 9-12.

<sup>50</sup> The Advocate General of Bombay observed, "The three Presidencies are as three distinct territories as England, Ireland and Scotland, and an Irish judgment cannot be enforced in England or an English judgment in Ireland unless by means of an action upon a judgment prosecuted in that country in which the satisfaction of the judgment is sought to be obtained." Leg. Dep. Pros., 14 November 1836, No. 22.

the question of the execution of judgments beyond the jurisdiction of the courts pronouncing them in places throughout British India.<sup>51</sup> Act VII of 1841 was adopted to provide for evidence of witnesses being taken by one court for the use of another throughout British India.<sup>52</sup> Mention may also be made of two enactments of local and limited application. Act XXVII of 1839 provided for the execution of the decrees of the District Judge of the 24-Parganas, and Act XVI of 1851 for the trial of persons apprehended in Calcutta with property stolen in the mofussil areas.

Of the miscellaneous measures relating to judicial procedure, Act XXIX of 1837 provided for the substitution of Persian by the regional languages in judicial and revenue proceedings. Act V of 1841 made certain important changes and introduced uniformity in the procedure for the trial of offences against the State in the different Provinces.<sup>53</sup> Act XII of 1843 provided for the uniform use of the English language by the judges of the superior courts, and of the vernacular languages by the judges of Indian nationality, in laying down the points to be decided and in recording their decisions and reasons thereof.<sup>54</sup> Acts I of 1846 and XX of 1853 regulated the appointment of pleaders and the remuneration to be paid to them in the Company's Courts, the main object being to prevent unhealthy competition and lowering of standards in the profession.<sup>55</sup> The privilege of defence through counsel granted in the Crown Courts by Act XXII of 1839 was extended to the Company's Courts by Act XXXVIII of 1850.<sup>56</sup> In the case of offences which affected the public, Act II of 1856 provided that Magistrates might act on information only, without requiring a written petition from the injured party.

<sup>51</sup> Leg. Letter to Court, 22 December (No. 21) 1852, paras 55-60.

<sup>52</sup> Leg. Letter to Court, 16 August (No. 17) 1841, paras 14-17.

<sup>53</sup> *Ibid.*, para 11.

<sup>54</sup> Report of the Indian Law Commission, 4 December 1841, paras 14-16, Parl. Papers, H. C. No. 623 of 1844, p. 253.

<sup>55</sup> Leg. Letter to Court, 31 October (No. 28) 1846.

<sup>56</sup> Leg. Letter to Court, 13 June (No. 8) 1851, paras 13-15.

*Regulation of Economic Life and Revenue Administration—  
Economic Integration and Development*

*Currency reforms :* We shall now pass on to a study of matters relating to the financial and general economic policies of the Government. The extensive powers of control over Provincial finances and the power to legislate for the whole of British India, which were conferred by the Charter Act of 1833, enabled the Government of India to pursue a unified economic policy as far as circumstances permitted and thus help in the gradual integration of the country into a single economic unit. The period opens with great currency reforms. By Acts XVII of 1835 and XIII of 1836 the gold *molur* ceased to be legal tender and the Indian currency system came to be one of silver monometalism. A uniform rupee coin was introduced as the sole tender "in all the Presidencies and possessions of the British nation in India".<sup>57</sup> Act XXI of 1835 instituted a new system of copper coins in Bengal, and this was extended to the rest of the Company's territories by Act XXII of 1844. In the Straits Settlements, however, neither the rupee nor the copper coins issued under these enactments were popular. Hence, in supersession of the Indian copper coins, Act VI of 1847 provided for a separate set of coins, subsidiary to the customary dollar, namely, cents, half-cents and quarter-cents. The rupee continued to be legal tender without the support of a subsidiary currency. This too was anomalous and led to complications. Therefore, Act XVII of 1855 reintroduced the Indian copper coins. But this time both the rupee and the dollar, together with their respective subsidiary coins, were recognised as legal tenders, and an exchange rate between them was fixed.<sup>58</sup> The Indian Currency Act of 1861, which provided for the issue of currency notes, forms a great landmark in currency legislation. The notes hitherto issued by the Presidency Banks were in circulation for the most part in the Presidency towns only and they could not meet the growing needs of the country.

<sup>57</sup> Leg. Dep. Pros., 29 June 1835, Nos. 2-3.

<sup>58</sup> Statement of Objects and Reasons by J. P. Grant, 1 September 1854, Papers of Act XVII of 1855.

*Customs and transit duties:* Of equal importance to economic integration and development were the measures which secured free movement of trade, both within and without the country, by a revision of the customs policy. In the early 19th century each of the Presidencies formed a separate customs unit, and "trade between one Province and another was as much subject to duty as trade with foreign countries".<sup>59</sup> Within the Presidencies themselves there were transit and town duties which hampered the free flow of trade. The position was considered on all hands very unsatisfactory. Charles Trevelyan submitted his well-known report on these duties in 1834, and they were abolished in the short-lived Agra Presidency or the North-West Provinces by Alexander Ross. Similar action was taken in Bengal under Act XIV of 1836. This enactment also introduced a revised tariff system, which became a model for the other Presidencies. Similar reforms were effected by Acts I of 1838 and XIX of 1844 in Bombay and VI of 1844 in Madras. From this time onwards, according to Hamilton, the three Presidencies could be regarded "as a single economic country possessing an identical tariff of import and export duties".<sup>60</sup> Act XXX of 1854 placed Arakan, Pegu, Martaban and Tennaserim nearly on the same footing as Bengal and Orissa as regards sea customs.

*Navigation Laws and Imperial preference :* The customs policy of the Government of India was largely influenced by the developments in England and the policy of the British Government. This was the period of transition from mercantilism to *laissez faire* in England and the same trend is noticeable in the Government's policy in India. The British Navigation Laws were not strictly applicable to India. Under 37 Geo. III, c.117, ss. 1-3, the regulation of trade by foreigners with the Company's possessions was left entirely in the hands of the Court of Directors. The latter's policy was not to prohibit foreigners from trading with India; only the tariff was adjusted to favour British goods and shipping.<sup>61</sup> Thus, under Act

<sup>59</sup> C. J. Hamilton, *The Trade Relations between England and India, 1600-1896* (Calcutta, 1919), p. 221.

<sup>60</sup> *Ibid.*, p. 227.

<sup>61</sup> Leg. Dep. Pros., 19 March 1838, No. 12, and 9 April 1838, No. 1.

XIV of 1836, which revised the tariffs in respect of Bengal there was a general import duty of 3½ per cent. This was doubled in the case of foreign (non-British) goods or goods carried by foreign ships; goods which were both foreign and were carried in foreign bottoms had to pay fourfold duties. Foreign ships were, however, prohibited under the Court Regulations from engaging in coastal trade of any kind. Vessels belonging to friendly States in Asia and Africa were allowed special concessions. Act XIV of 1837 was enacted to give them "equal privileges with British vessels as regards the duty on the export and import of goods", provided a reciprocal concession was made in respect of British ships by the States.<sup>63</sup> Restrictions as regards coastal trade were not all enforced in practice in their case.<sup>64</sup>

Under the law, British ships, duly registered as such in the United Kingdom, enjoyed special and valuable privileges, and there was great demand for extending those benefits to ships built within the limits of the Company's Charter. 3 & 4 Vic. c.56, empowered the Indian Legislature "to confer for all the purposes of trade within the limits of the Company's Charter the privileges of British ships on all ships built within the limits and owned by Her Majesty's subjects for whom the Governor General's Council has power to legislate or by Native Princes or States in subordinate alliance . . . with the East India Company, or by the subjects of any such Princes or States".<sup>65</sup> In exercise of this power, Act X of 1841 instituted a system of registration and provided for the issue of passes to differentiate between foreign ships and ships of this category. Act XI of 1850 was enacted to make good a lacuna in the

<sup>62</sup> This was reiterated and certain lacunae in the rules governing the trade of foreign nations with India were removed by the Court's Regulations of 28 July 1837 and 22 August 1838. Leg. Letters from Court 28 July (No. 7) 1837 and 14 August (No. 12) 1839.

<sup>63</sup> Leg. Dep. Pros., 17 April 1837, Nos. 13-14, and Leg. Letter to Court 10 October (No. 15) 1837.

<sup>64</sup> Leg. Letters to Court, 2 September (No. 17) 1843 and 7 October (No. 27) 1848.

<sup>65</sup> Marine Letter from Court, 26 August (No. 9) 1840.

enactment in respect of vessels owned by the Indian Princes or their subjects.<sup>65</sup>

Certain tariff concessions granted to Indian products entering the British Isles necessitated legislative intervention by the Government of India: Acts XXXII of 1836, XV of 1839 and XI of 1842 regarding sugar and Acts VI and XXIII of 1841 regarding rum and rum-shrub.

Commencing with the reforms of Huskisson in 1822, the policy of protection and Imperial preference on which these measures were based underwent a rapid revision in England. The Navigation Laws were mostly repealed by 12 & 13 Vict., c. 29, in 1849 and 17 & 18 Vict., c. 5, in 1854. Steps in consonance with this policy were taken in India. Act VI of 1848 abolished the preferential duties favouring British ships, and Act V of 1850 threw open the coastal trade of India to all foreign ships "without any restriction, other than is or shall be equally imposed on British ships, for securing payment of duties of customs or otherwise". When the tariff concessions enjoyed by sugar, rum and rum-shrub in the United Kingdom were abolished, the Government of India passed Acts XIX of 1854<sup>67</sup> and VI of 1863 repealing earlier enactments on the subject. Discrimination in favour of British goods continued to be a special feature of the Indian tariff system for some more time. This was finally ended by Act VII of 1859, which placed foreign and British goods on the same footing.<sup>68</sup>

*Measures to encourage investment and facilitate business transactions—(i) European Settlement:* The removal of restrictions on the entry and settlement of European subjects by the Charter Act of 1833 was a great landmark, for with it may be said to commence, though in a slow and halting way, the economic transformation of the country.<sup>69</sup> While Parliament

<sup>65</sup> Leg. Dep. Pros., 15 March 1850, Nos. 90, 92 & 188.

<sup>67</sup> Statement of Objects and Reasons by Sir Barnes Peacock, 9 March 1854, Papers of Act XIX of 1854.

<sup>68</sup> Lord Canning's speech while sponsoring the Bill, Proceedings of the Leg. Council of India, 1859, pp. 108-21. Also, Pramathnath Banerjee, *Fiscal Policy in India* (London, 1922), p. 49.

<sup>69</sup> It may be noted that there was no substantial increase in the number

had taken the basic step, it was for the Government of India to adopt other measures to encourage their settlement. Act IV of 1837 was enacted to enable European British subjects to hold land or landed interest not only for any term of years but in perpetuity. Further, since Europeans had an important interest in, if not a near monopoly of, big business concerns and other enterprises, theirs was the biggest single influence in respect of most of the laws bearing upon trade and industry. How potent this was is seen from the transactions leading to some of the enactments, e.g., Acts XIX of 1845 incorporating the Assam Company, XLIII of 1850 for the regulation of joint stock companies, VI of 1856 for grant of patents, and XI of 1860 for enforcing indigo contracts.

While opening India to free settlement by European British subjects, Parliament directed the Government of India to adopt such measures as were necessary for the protection of Indian subjects. To secure this object, it was generally considered essential to make European British subjects amenable to the jurisdiction of the Company's Courts, both in civil and criminal matters. As already seen, this was accomplished only in civil matters. In the field of taxation and revenue administration, Act XV of 1837 did away with the anomaly of Europeans being exempt from the *chaukidari* tax. Act II of 1853<sup>70</sup> made good an important lacuna in Act IV of 1837 and laid down clearly that all subjects of Her Majesty were liable to the same jurisdiction as the natives "in respect of public and police duties and public charges incident to the holders of land or their local agents or managers".<sup>71</sup> No special laws were enacted for the protection of the Indian subjects "from insult and outrage in their persons, religions or opinions".<sup>72</sup>

of Europeans outside the Company's service during the period. The great influx of Europeans began only after the Revolt of 1857 and the development of communications. L. S. S. O'Malley (Ed.), *Modern India and the West* (London, 1941), pp. 576-7.

<sup>70</sup> This enactment was regarded as a thin end of the wedge and strongly opposed by the British community. W. Lee-Warner, *The Life of the Marquis of Dalhousie*, Vol. I (London, 1904), p. 300; and the *Calcutta Review*, Vol. XIX, p. 208.

<sup>71</sup> Leg. Letter to Court, 2 June (No. 11) 1853.

<sup>72</sup> 3 & 4 Wm. IV, c. 85, s. 85.



This was done in a general way as applicable to all persons by the Penal Code of 1860.

(ii) *Banks, joint stock companies and trusts:* The Bank of Bengal was functioning under the charters granted in 1809 and 1823. Acts XIX of 1836 and XXIV of 1838 were enacted to increase and regulate its capital stock. Act VI of 1839 was necessitated by a number of financial scandals—the Rajkissen Dutt forgeries of 1829 and the failure of Alexander & Co. in 1832<sup>73</sup>—and the Bank of Bengal was given a fresh charter. The other two Presidency Banks, those of Bombay and Madras, were established under Acts III of 1840 and IX of 1843 respectively, the measures being drawn up on the same lines as Act VI of 1839. The charters of these banks remained in force till 1862, “being only slightly modified in 1854<sup>74</sup> when advances on the shares of guaranteed railways were allowed, and in 1855<sup>75</sup> when the Presidency Banks were permitted to purchase and sell Government securities or the shares of the Presidency Banks and receive the interest or dividends on behalf of their constituents”.<sup>76</sup> Act XXIV of 1861 was a supplement to the Indian Currency Act of the same year to enable the Chartered Banks to manage the issue, payment and exchange of Government currency notes and to discharge certain other functions hitherto transacted by the Government treasuries.

The Government received frequent applications from joint stock companies for charters of incorporation with all the attendant privileges. As regards banking institutions the Government of India had clearly the power to grant them the privileges under 47 Geo. III, c. 68, s. 8. But it was doubtful if it had the power in other cases.<sup>77</sup> With the concurrence of the Court of Directors, however, it proceeded on the assumption that it did possess the power. The Bengal Bonded

<sup>73</sup> J. B. Brunyate, *An Account of the Presidency Banks* (Calcutta, 1900), pp. 5-7.

<sup>74</sup> Act XXI of 1854.

<sup>75</sup> Act XXVII of 1855.

<sup>76</sup> G. Findlay Shirrass, *Indian Finance and Banking* (London, 1920), p. 350.

<sup>77</sup> See pp. 253-5 above. The Charter Act of 1853 placed the law on a firm footing.

Warehouse Association was incorporated by Act V of 1838. The Assam Company, formed primarily for developing the tea industry, was incorporated by Act XIX of 1845, and its charter was renewed for twenty years by Act IV of 1855. The Union Bank of Calcutta, which went into liquidation in 1847, was granted by Act XXIII of 1845 certain privileges such as the right to sue and be sued as a corporate entity. The frequency of applications from partnership companies for the privileges of a corporation made a general enactment highly necessary. Accordingly, Act XLIII of 1850 provided for the regulation of joint stock companies, including those which were formed for literary, scientific and charitable purposes. Although the principle of limited liability was not adopted,<sup>78</sup> it is a great landmark in the history of Indian finance. The measure was based on recent English statutes, in particular 7 & 8 Vict., c. 110, and conferred on the companies the privilege to sue and be sued as corporate entities. The assets of partnership were made liable to the demands of creditors before the private assets of the several partners could be touched. In case the assets of partnership were inadequate to meet the demands, an equitable way of distributing the burden among the partners was provided.<sup>79</sup> The next step was taken by Act XIX of 1857, based on a British statute of the previous year, 19 & 20 Vict., c. 47. It provided for formation of companies on the basis of limited liability, except for banking or insurance.<sup>80</sup> Following further changes in English law, the benefit of limited liability was extended to banking institutions by Act VII of 1860, with the proviso that "no banking company claiming to issue notes in India shall be entitled to limited liability in respect of such issue".

(iii) *Patents and copyrights:* On a representation from the Bengal British India Society the first copyright law was passed

<sup>78</sup> Minute by Bethune dated 5 March 1849, Leg. Dep. Pros., 27 December 1850, No. 14. Bethune strongly opposed limited liability of shareholders, and the failure of the Union Bank of Calcutta was much too green in memory to permit the adoption of the principle.

<sup>79</sup> Leg. Letter to Court, 13 June (No. 8) 1851.

<sup>80</sup> Report of the Select Committee, 30 May 1857, Papers of Act XIX of 1857.

in 1847. It laid down that copyright should endure for 42 years from the date of publication, or for the natural life of the author and 7 years thereafter, whichever period was greater.<sup>81</sup> Act XV of 1859 was the first patent law enacted in India.

(iv) *Registration of deeds and conveyances:* A subject of great importance for the security of business transactions was registration of deeds and conveyances. Prior to 1843, while certain instruments were required to be registered, those which were registered did not take precedence over unregistered ones if it was proved that the party registering knew the existence of the latter. Registration offered no firm security against conveyances or instruments produced as of previous date by unregistered claimants, and there was great room for perjuries, fraudulent dealings, and other practices. Act I of 1843, as amended by Act XIX of the same year, gave priority claim to conveyances and other instruments, duly registered, concerning "sale or gift of lands, houses or other real property" and "mortgage on land, houses and other real property as well as certificates of the discharge of such incumbrances". Subsequent measures during the period were designed to improve only the machinery of registration.<sup>82</sup> These enactments were of such universal importance and bore so heavily and intimately on the life of the people that the question of a further revision of the law was frequently mooted. But it was only in 1864 that the next step was taken under the able stewardship of Sir Henry Maine.<sup>83</sup>

(v) *Other measures for the regulation of business transactions:* On a suggestion from the judges of the Supreme Court at Calcutta that it was of the utmost importance "to preserve a uniformity of laws here and in England respecting all mercantile transactions",<sup>84</sup> Acts XIII of 1840 and XX of 1844

<sup>81</sup> Act XX of 1847. Leg. Letter to Court, 4 March (No. 12) 1848.

<sup>82</sup> Acts IV of 1845, XVIII of 1847, XI of 1851, XXIX of 1856 and III of 1859.

<sup>83</sup> Act XVI of 1864. Proceedings of the Legislative Council of India, 1864, p. 532.

<sup>84</sup> Leg. Dep., Original Consultation, 20 July 1844, No. 8. Leg. Dep. Pros., 23 March 1840, No. 1.

extended the well-known Factors Acts<sup>85</sup> to cases governed by English law in India. These measures enabled merchants to deal with factors or agents as if they were principals.<sup>86</sup> Similarly, Act VI of 1840 extended to India a number of amendments to the law relating to Bills of Exchange, and Act XIV of the same year extended 9 Geo. IV, c.14, with a view to render a written memorandum necessary for the validity of certain promises and engagements. Act XV of 1851 was enacted for the suppression of frauds in the cotton trade of Bombay to improve the export market. Act XXVIII of 1855 repealed the usury laws as was done in England. The new principle, adopted uniformly throughout the Company's territories, was that the rate agreed to by the parties should be binding, and in the absence of an agreement, the courts of law should award such rates as they deemed reasonable.<sup>87</sup>

*Development of communications and public works:* Of no less importance than these measures for the regulation of trade and industry was the great start made in the time of Dalhousie in developing communications and launching upon a planned and integrated public works programme. The legislation of the period reflects to some extent the feverish activity in these fields. The development of the Indian railways under the old guarantee system of free land and assured minimum profit was based on Parliamentary statutes incorporating British companies offering their capital and services for the purpose. The first of these statutes was 12 & 13 Vict., c.83, incorporating the Great Indian Peninsula Railway Company. Legislation in India was limited to matters which were incidental to the construction and management of the railways. The first need of the companies was land and the existing law for its acquisition was totally inadequate. Acts XVII and XLII of 1850 and XX of 1852 were passed to meet current requirements, and Act VI of 1857, which applied to all the Provinces, revised and consolidated the whole of the law on the subject. There was

<sup>85</sup> 4 Geo. IV, c. 83; 6 Geo. IV, c. 94; and 5 & 6 Vict., c. 39.

<sup>86</sup> W. Holdsworth, *A History of the English Law*, Vol. XIII (London, 1952), p. 384.

<sup>87</sup> Minute by B. Peacock and Report of the Select Committee, Papers of Act XXVIII of 1855.

also need to regulate the conduct of passengers, the movement of goods, the enforcement of fares and freights, the maintenance of discipline among railway servants, etc. Acts III and XII of 1853 provided for these matters in respect of the Great Indian Peninsula Railway Company, and Act XVIII of 1854 was passed to provide uniform regulations for the railways throughout the Company's territories.<sup>88</sup> Arising out of certain labour troubles, Act IX of 1860 was enacted to provide a summary and convenient tribunal for handling pecuniary disputes between employers and workmen engaged on railways and other public works.<sup>89</sup>

The law regarding the postal system underwent two major revisions during the period, once under Act XVII of 1837 and again under Act XVII of 1854. The latter introduced a single rate postage irrespective of distance throughout the country and it constitutes a great landmark in Indian postal history. Act XXXIV of 1854, replaced by Act VIII of 1860, provided for the establishment and management of electric telegraphs as a Government monopoly.

A number of measures were passed regarding maintenance of ports and lighthouses. Of these Act XXII of 1855 is the most significant. It provided one law for the whole of the Company's territories for the regulation of harbours and the levy of port dues. As regards road development, the only measures which were enacted before the coming of Lord Dalhousie referred to the levy of tolls at Bhore Ghat in the Bombay Presidency.<sup>90</sup> The Government of India was unwilling to vest the Local Governments with a general power to levy tolls.<sup>91</sup> The policy underwent a change with Dalhousie. Act VIII of 1851 vested the Local Governments with a general power to levy tolls on roads and bridges at their discretion. A schedule of duties prescribing maximum rates was laid down, and the whole of the proceeds was to be appropriated

<sup>88</sup> Select Committee Report, 22 July 1854, Papers of Act XVIII of 1854.

<sup>89</sup> Papers of Act IX of 1860.

<sup>90</sup> Acts XVIII of 1836, II of 1837 and VIII of 1838.

<sup>91</sup> Leg. Letter to Court, 8 March (No. 4) 1841, para 33, and Leg. Letter from Court, 3 August (No. 13) 1842, para 10.

only for their construction and maintenance<sup>92</sup>. There were also a few measures relative to levy of tolls and water-cesses on canals and rivers.<sup>93</sup>

### *Protection of Labour and Other Welfare Measures*

*Slavery and forced labour:* The most important socio-economic reform of the period was the abolition of slavery, which has been dealt with earlier. Connected with it, there was the question of forced labour, which had the sanction of immemorial custom in many parts of the country. This was abolished under s. 374 of the Penal Code of 1860, except as specifically provided by law. In anticipation of the adoption of this provision, Act I of 1858, which applied to Madras, declared that it was lawful to impress labour for the maintenance and repair of irrigation works and to fight inundations. Neglect to comply with a call for labour was punishable only with fine, and labourers were to receive reasonable wages.<sup>94</sup>

*Emigration of Indian labourers:* Slavery was abolished in the British colonies in 1833. The emancipated slaves showed marked disinclination to work on plantations, and consequently there was acute shortage of labour. Indian labourers were very much in demand as they were good workers and amenable to discipline, and recruitment to serve in Mauritius commenced very early. As the labourers were uneducated, backward and ignorant, the Government of India had to take steps to safeguard their interests. Acts V and XXXII of 1837 were enacted for the regulation of emigration through issue of permits. The conditions of service in the colonies were to be explained to the labourers and their real wishes ascertained before permits were given. The period of contract was to be five years and the return passage was to be paid by the employer. Provision was also made for the inspection of

<sup>92</sup> Leg. Dep. Pros., 4 February 1851, Nos. 1-2, 7-9 & 49, and Leg. Letter to Court, 30 December (No. 22) 1851.

<sup>93</sup> Acts XXII of 1836, VII of 1845, X of 1853, XXXII of 1855, XXII of 1856 and I of 1858.

<sup>94</sup> Statement of objects and reasons, 18 April 1857, Papers of Act I of 1858.

vessels carrying emigrants with a view to ensure safe and healthy conditions of travel. The Court of Directors did not, however, approve of the measures, and directed the Government of India to stop all emigration pending the decision of Parliament, which was enquiring into the subject.<sup>95</sup> Act XIV of 1839 was passed giving effect to this order.<sup>96</sup> Auckland was, however, in favour of resuming emigration, subject to safeguards. After prolonged negotiations between the Colonial Office and the India Board, an agreement was reached between Lord Ellenborough, the President of the Board of Control and Governor-General designate, and Lord Stanley, the Colonial Secretary, and Act XV of 1842 was passed permitting emigration to Mauritius from the ports of Bombay, Madras and Calcutta.<sup>97</sup> Further pressure from the colonial interests led to legislation permitting emigration to other British Colonies—British Guinea, Trinidad and Jamaica in 1844, St. Lucia and Granada in 1855, and St. Vincent, Natal and St. Kitts in 1860. The abolition of slavery in the French colonies gave rise to similar problems as in the British colonies, especially in Reunion and Antilles. The French Government's requests for permission to recruit Indian labour were not at first viewed with favour, because it was considered difficult to secure the observance of the principles on the basis of which emigration to the British colonies was permitted.<sup>98</sup> In 1860, however, a convention was signed between Great Britain and France permitting emigration to the French colonies, and Act XLVI of the year was passed to give effect to it.<sup>99</sup> Measures were also taken to check crimping through Ceylon<sup>100</sup> and the ports

<sup>95</sup> Leg. Letters from Court, 1 August (No. 9) 1838 and 3 February (No. 3) 1841.

<sup>96</sup> Leg. Letter to Court, 27 May (No. 14) 1839.

<sup>97</sup> Preamble to Act, and I. C. Cumpstone, *Indians Overseas in British Territories, 1834-54* (London, 1953), pp. 63-6. Act XXI of 1843 cancelled emigration through the ports of Madras and Bombay, but this was permitted again by Acts VIII of 1847 and IV of 1852.

<sup>98</sup> Leg. Letter from Court, 25 June (No. 11) 1852.

<sup>99</sup> Preamble to Act.

<sup>100</sup> By Act XIII of 1847, free movement of labour between the two countries, which had been stopped by the general prohibitory order of 1839, was restored after the Ceylonese Government had taken steps to

of foreign powers in India.<sup>101</sup> Besides permitting and regulating emigration, all these measures provided valuable safeguards for protecting the interests of the emigrants during passage and while serving in foreign lands. But their success depended largely on the co-operation of the Colonial Governments. The bad treatment accorded to a batch of emigrants to Mauritius led to the enactment of Act XIX of 1856 empowering the Governor General in Council in his executive capacity to suspend emigration to any of the colonies if the terms and conditions under which it was permitted were not properly observed, and also to cancel the suspension if the abuses were remedied.<sup>102</sup>

*Indigo contracts:* Another matter that received great attention was the relationship between European planters and the peasants under contract with them to grow indigo on their lands. The law as it prevailed at the beginning of the period favoured the planters unduly. They had a prior lien on the crop to the prejudice of the zamindars, who owned the lands planted with indigo but were not parties to the contracts entered into by their tenants. Peasants failing to fulfil their indigo engagements were deemed guilty of misdemeanour. Further, persons found guilty of instigating them to break the engagements were liable to the full amount of the penalty provided in the contracts, together with costs. Apart from the economic power and social influence of the planters, the harshness of these Draconian provisions was made more severe by the immunities enjoyed by them in respect of the jurisdiction of the Company's Courts. After a detailed enquiry into the subject, by Act XVI of 1835, Lord Bentinck repealed the law which made the breach of an indigo contract a penal offence, and also did away with the liability of the abetter.<sup>103</sup> Agitation

ensure that the island was not used as a base for recruiting Indian labour for the colonies.

<sup>101</sup> Act XXIV of 1852.

<sup>102</sup> Statement of objects and reasons by Sir B. Peacock, 6 September 1856, Papers of Act XIX of 1856. Also, Proceedings of the Legislative Council of India, 1856, pp. 541-4.

<sup>103</sup> Leg. Dep. Pros., 28 December 1835, Nos. 24-9, and Leg. Letter to Court, 28 December (No. 9) 1835.



on the part of the planters led to a slight retrograde move in the next year. Act X of 1836 made the abetter a party to the action for damages. It also sought to safeguard the rights of contesting claimants by requiring the person removing the crop to provide security to make good any claim that came to be finally established.<sup>104</sup> Act IV of 1840 for the prevention of affrays concerning possession of land and all its accessories in Bengal was primarily intended to cover indigo affrays, which were frequently disturbing the peace of the countryside.<sup>105</sup> The subject came into prominence again in the late fifties owing to the collective resistance offered by the peasantry to the oppressions practised by the European planters and the widespread disturbances which ensued. The Legislative Council wanted to revive the penal remedies for the enforcement of indigo contracts, but it was restrained from doing so by the Secretary of State for India.<sup>106</sup>

*Other welfare measures:* The Government's attention was frequently directed towards the relations of merchant seamen with their masters. Acts XXVII and XXVIII of 1850 and Act I of 1859 were enacted to regulate the relationship and protect seamen. A law of apprenticeship was enacted in 1850 to enable orphan children, especially European and Anglo-Indian, to learn a craft or a trade.<sup>107</sup>

### *Taxation and Revenue Administration*

The characteristic feature of the period was that taxation was exclusively central. A system of local taxation developed only after the Crown assumed the direct administration of India. The general policy of the Government during the period was that "all taxation should be uniformly and universally applicable to the whole of India".<sup>108</sup> However, as most of the

<sup>104</sup> Leg. Dep. Pros., 28 September 1835, Nos. 24-9, and Leg. Letter to Court, 30 May (No. 6) 1836.

<sup>105</sup> Leg. Letter to Court, 4 May (No. 13) 1840.

<sup>106</sup> See pp. 249-50.

<sup>107</sup> Leg. Letter to Court, 6 December (No. 19) 1850.

<sup>108</sup> P. Banerjee, *A History of Indian Taxation* (London, 1930), pp. 7 & 17.

taxes were inherited from the earlier period and there were a number of local interests and peculiarities to be considered, not many such laws were enacted.

*Land revenue:* In the realm of public finance, land revenue occupied the prime of place and received most attention. In Bengal, the law regarding recovery of revenue arrears was recast in 1822, and several amendments were made during the next two decades. But it was only in 1841 that the principles of land sales to realise revenues were satisfactorily settled.<sup>109</sup> Act I of the year was intended to facilitate revenue collection and to define the interest conveyed by public sales of *pattedari* estates. Act XII of the same year greatly increased the rigour of the law in respect of the *zamindari* estates; the *zamindaris* in respect of which revenue dues were not paid by the appointed date were liable to be sold the very next day by auction to the highest bidder. Act I of 1845 relaxed the rigour by requiring due notice to be given before the sales were effected. Act XI of 1859 was an important measure that sought to protect co-sharers and holders of under-tenures in respect of the estates brought to sale. In its anxiety to tighten up the machinery of revenue recovery, the Government woefully neglected the claims and interests of the tenantry. Under Act XII of 1841, the sale of a *zamindari* for recovering revenue dues terminated all tenancy agreements relating to it, and the new zamindars were at liberty to enhance at their discretion the rents to be paid by their tenants, except in certain specified cases.<sup>110</sup> Excepting for two minor enactments, Acts X of 1846 and VIII of 1848, it was not till 1859 that the interests of this class received due attention. Act X of the year was a great consolidating and amending measure which clearly recognised and defined the occupancy rights of tenants and made arrangements for upholding those rights, and it has been hailed the first modern tenancy law of India. As regards the perennial question of the relative roles of the revenue authorities and the civil courts in the adjudication of rent and revenue suits, the trend was to extend the jurisdiction of the former to ensure cheap and

<sup>109</sup> *Ibid.*, p. 404.

<sup>110</sup> B. H. Baden Powell, *Land Systems of British India* (Oxford, 1882), Vol. I, p. 639.

prompt disposal of cases. Bengal Regulation VIII of 1831, as amended by Act I of 1839, vested the jurisdiction in respect of summary suits for arrears of rent in the revenue authorities. Since there was a strong difference of opinion between the Governments of the Lower and the Upper Provinces, Act IV of 1846 vested the authority for effecting land sales in execution of civil court decrees in the judicial authorities in the Lower Provinces, and in the revenue authorities in the Upper Provinces. Under Act X of 1859, the original jurisdiction in suits between landlords and tenants was transferred from the civil to the revenue courts, with a limited appeal to the principal civil court of the district.

Land revenue legislation in respect of the other two Presidencies was comparatively scanty. The most outstanding measure in respect of Bombay was Act XI of 1852. It provided for the appointment of Inam Commissioners to enquire into the validity of titles to estates which were held wholly or partially free of rent. Of the other measures relating to Bombay, Act XI of 1843 sought to regulate the services of hereditary officers connected with revenue administration; Act XIII of 1842 gave greater discretionary powers to *jagirdars* and other holders of revenue to enable them to realise better the revenues alienated to them by the State; and Act XX of 1839 prohibited the levy of *huqs* or items of revenue relinquished by the State. Of the measures passed in respect of Madras, Act XXIII of 1856 and Act XXXIX of 1858 referred to the collection of arrears of revenue in the *ryotwari* areas; the latter laid down, among other things, that the movable properties of defaulters might be brought to sale and not merely the immovable properties.

*Customs and tariff:* Next to land revenue, customs formed an important source of revenue. A united customs policy was evolved in the first decade following the Charter Act of 1833, but there was no consolidated common customs law for the whole of British India till the enactment of Act VI of 1863. Legislation during the period referred to periodical adjustment of customs tariff and the routine of customs administration.

*Excise:* Of the various sources of excise revenue, salt was the most important. Tax on salt attracted great public attention,

both in England and India, because it bore heavily on the poor, and also the interests of the British salt and shipping industries were deeply involved. While salt duty was levied as an excise in all the Presidencies, its manufacture was a Government monopoly in Madras and Bengal. There was no uniformity in the rate of the duty, and there were also great variations in the law regulating the manufacture of salt and the administration of the revenue. It was only in 1905 that a uniform duty was levied throughout British India, except Burma. These wide variations obliged the Legislative Council to intervene frequently to provide for the different and varying needs of the Presidencies, but there was no outstanding measure.

Duty on opium was another source of revenue. Act XIII of 1857 in respect of Bengal was the only important amending and consolidating measure on the subject.

As regards revenue derived from spirituous liquors, *ganja*, etc., Act XIV of 1851 consolidated the law in respect of the Straits Settlements, and Act XXI of 1856 was a great consolidating and amending measure in respect of the Bengal Presidency. In Madras the basic law was Regulation I of 1820, and Act XXXII of 1845 was passed, among other things, to remove doubts as to the amenability of Europeans to the *abkari* law. As regards Bombay the excise arrangements had been consolidated by Regulation XXI of 1827 and this underwent a major change under Act III of 1852. There were different laws governing the Presidency towns. Acts XI of 1949, XIX of 1852 and XVII of 1859 consolidated and amended the excise laws in respect of Calcutta, Madras and the island of Bombay respectively.

*Stamps:* Stamp duties, both judicial and commercial, were levied under the old Regulations in all the three Presidencies, and the law greatly differed as between the Presidencies and also between the Presidency towns and the mofussil areas. The question of having one uniform scale of duties and one uniform mode of administration was mooted in 1835,<sup>111</sup> and

<sup>111</sup> Leg. Dep. Pros., 26 October 1835, No. 6, and Leg. Letter to Court, 29 February (No. 4) 1836.

the first Indian Law Commission submitted a valuable report on 21 February 1837.<sup>112</sup> As the subject was closely linked with the general taxation policy of the Government, there was considerable delay in an acceptable scheme being drawn up, and it was not till 1860 that this object received its first concrete expression. Act XXXVI of the year consolidated the law on the subject for the whole of British India including the Presidency towns, and as much uniformity as possible was achieved in the scale of duties and other matters.<sup>113</sup> Prior to this enactment, a few measures of local application were passed of which Act XVII of 1848 was the only one of importance. The object of this measure was to substitute stamp duties in place of institution fees in the courts of the District Munsiffs in the Madras Presidency.

*Income-tax and tax on profession:* The close of the period under study witnessed the imposition of a tax on income and of a licensing duty on arts, trades and dealings under Acts XXXII of 1860 and XVIII of 1861 respectively. The policy of the Company's Government in India had so far been against imposition of direct taxes, and it was the general belief that such taxes would be unpopular and ill-suited to the circumstances of the country.<sup>114</sup> The enactment of these measures marked a significant departure, and the Government was forced to take this step by the acute financial stringency that prevailed at the time. The imposition of these taxes met with stiff opposition in the Government circles and among the public and both the measures were short lived. Even before it came into force, Act XVIII of 1861 was repealed by Act II of 1862, and Act XXXII of 1860 was not renewed after the period for which it was enacted had elapsed.

<sup>112</sup> Leg. Dep. Pros., 6 March 1837, No. 21. Bethune drew attention to the need for early legislation on the subject in 1848. Leg. Dep. Pros., 26 August 1848, No. 6.

<sup>113</sup> Statement of objects and reasons, 2 July 1859—Papers of Act XXXVI of 1860, pp. 39-46.

<sup>114</sup> P. Banerjea, *A History of Indian Taxation* (London, 1930), pp. 38, 49-50 & 502.

*Religious, Cultural and Humanitarian Reforms*

With British rule in India becoming strong and secure, the influence of the Evangelicals and those who believed in Westernising India increased enormously and it was a potent force right up to the Revolt of 1857. This is clearly reflected in the legislation of the period.

*Government and religious endowments:* Prior to the establishment of the British rule in India, the rulers of the country took an active part in the social and religious life of the people, particularly of the religious or sectarian group to which they belonged. The relationships which developed had crystallised into custom, and these continued under British rule in most cases. But the association of a Christian Government with heathen religious institutions and practices appeared clearly *incongruous to the orthodox, and the whole weight of missionary influence, both in India and England, was thrown against its continuance in any form.* Seasoned administrators and statesmen, however, warned that any departure from the existing policy would be deeply resented by the people, but their warnings were lost in the sentimental wave of missionary propaganda. Great interest in the subject was evinced in England, and the Court of Directors exerted a continuous pressure on the Government of India to bring about a change.

The Government's association with the Hindu and Muslim religious institutions took many forms. Landed and other properties belonging to them were administered for their benefit by the Government. Various payments were made to them in accordance with usage or as a part of the revenue settlements. Government officers took part in religious ceremonies and parades: troops were called out, military bands played, and offerings made. In 1841 the Court of Directors ordered that Government servants should not participate in religious ceremonies in their official capacity,<sup>115</sup> and the order was given effect to by executive instructions.<sup>116</sup> It was not easy,

<sup>115</sup> Leg. Letter from Court, 31 March (No. 11) 1841. See also Parl. Papers, H. C. Nos. 357 of 1837, 39 of 1839, and 86, 232 and 328 of 1841.

<sup>116</sup> Leg. Letter to Court, 13 September (No. 20) 1841.

however, to dissociate the Government from its financial and administrative commitments. The first step in this direction was taken by Act X of 1840. By this measure the pilgrim taxes levied at Allahabad, Gaya and Jagannath were abolished.<sup>117</sup> The management of the affairs of the famous temple at Jagannath was also transferred under the Act to the Raja of Khorda, who was hereditarily in charge of it, and the Government freed itself from the odium of being a "dry nurse to Vishnu" and a "church-warden of Juggernaut".<sup>118</sup> The annual allowance to the temple, however, continued and was the target of attack from time to time. Lord Dalhousie's Government put forward a Bill to stop the allowance,<sup>119</sup> but the Court of Directors did not approve of it. It directed that a consolidated sum should be paid to the temple in lieu of the annual allowance in final discharge of all other claims upon the Government.<sup>120</sup>

The Court of Directors was also anxious that the Governments at the different Presidencies should free themselves from fiscal and administrative responsibilities in respect of other religious institutions. While the object was effected in Bombay without recourse to legislation,<sup>121</sup> it was necessary to repeal Regulation XIX of 1810 in Bengal and Regulation VII of 1817 in Madras. The subject was so intricate and opinion so divided that a Bill drawn up by C. H. Cameron in 1846 and a Bill sponsored by Sir Bartle Frere in 1860 failed to be adopted.<sup>122</sup> It was only in 1863, by Act XX of the year, that the responsibilities hitherto shouldered by the Local Governments were transferred to Boards of Trustees, who were made answerable

<sup>117</sup> In 1831 Lord Bentinck recorded his opinion that it was inexpedient to repeal these taxes. P. Banerjee, *A History of Indian Taxation* (London, 1930), pp. 505-6.

<sup>118</sup> Leg. Letter to Court, 9 March (No. 8) 1840. Parl. Papers, H.C. No. 628 of 1840.

<sup>119</sup> Leg. Dep. Pros., 12 December 1851, Nos. 7, 9, 34 & 35. Leg. Letter to Court, 29 November (No. 19) 1851.

<sup>120</sup> Leg. Letter from Court, 5 May (No. 7) 1852.

<sup>121</sup> Proceedings of the Legislative Council of India, 1860, pp. 478-9.

<sup>122</sup> Religious Endowments Bill of 1860—Proceedings of the Legislative Council of India, 1860, pp. 324-6 & 462-84.

for their conduct to persons interested in the institutions and to the civil courts.<sup>123</sup>

*Sati, Meriah sacrifices and female infanticide:* While the Government's policy was, on the whole, one of neutrality in social and religious matters and opposed to any active intervention in the life of the people, the humanitarian spirit of the age led to certain basic reforms for the protection of human life and personality. The abolition of slavery, the regulation of indentured labour, and the revision of the penal laws to make them more humane have been considered earlier. The practice of *sati* or self-immolation on the death of a husband was prohibited in all the three Presidencies in 1830. The Government of Bombay represented that its Regulation XVI of 1830 made assistance in any rite of *sati* illegal, but not the act itself.<sup>124</sup> The Government of India, however, was unwilling to disturb the public mind once again upon this delicate subject.<sup>125</sup> The Penal Code of 1860 covered both the act of committing suicide by way of *sati* or otherwise, and the abetting of it.<sup>126</sup>

Suppression of human sacrifice among the Meriahs and female infanticide among the Khonds and other tribes presented a serious problem. These tribes were distributed over both the Presidencies of Bengal and Madras. For the effective suppression of these crimes, it was essential to have a common policy and unified direction. These were provided by Act XXI of 1845.

*Marriage and inheritance:* While the Government of India was opposed to any interference with the personal laws of the communities, it felt morally impelled to interfere in certain matters. There were first the marriage laws of the Hindus, which did not permit widows to marry again. The Government's sympathies were entirely with the small group of Hindu

<sup>123</sup> Preamble to Act. Also, Proceedings of the Legislative Council of India, 1863, pp. 47-8.

<sup>124</sup> Minute by R. Grant, Governor of Bombay, Leg. Dep Pros., 18 January 1836, No. 2.

<sup>125</sup> *Ibid.*, No. 3. Also, Leg. Letter to Court, 2 May (No. 5) 1836, paras 63-4.

<sup>126</sup> Act XLV of 1860, ss. 306 & 309



reformers who considered the position to be highly iniquitous and productive of great suffering. The subject was first considered by the Law Commission in 1837, but the matter was not pursued as the general opinion did not favour intervention.<sup>127</sup> The movement for reform gathered momentum particularly in Bengal, and the question was again taken up in 1855 on a petition submitted to the Legislative Council under the leadership of the great social reformer, Iswar Chandra Vidyasagar. The Government was quite aware of the wide-spread opposition to the proposal, but it considered it its duty to prevent the majority in the community to force its views of life and religion on the minority, however microscopic it was. As explained by J. P. Grant who introduced the measure, it was only an enabling measure to remove the legal incapacity to contract such marriages: "It will interfere with the tenets of no human being, but it will prevent the tenets of one set of men from inflicting misery and vice upon the families of their neighbours, who are of a different and of a more humane persuasion."<sup>128</sup> But the ticklish question of inheritance and guardianship of children had to be faced. The measure that was finally passed, Act XV of 1856, secured for the widow who decided to marry again the enjoyment of properties she received as gifts, and of rights she possessed irrespective of her first marriage; but she was given no right to any of her deceased husband's property. The guardianship of children was reserved for the near relatives of the deceased husband, subject to certain restrictions. At about the same time, there was wide-spread demand for the abolition of polygamy among the Kulin Brahmins of Bengal; but there was no move in the Council to legislate on the subject.<sup>129</sup>

Marriage among Christians in India was a matter which

<sup>127</sup> See especially the views of the judges of the Supreme Courts. Papers of Act XV of 1856, pp. 67-81.

<sup>128</sup> Statement of objects and reasons by J. P. Grant, 17 November 1855, *ibid.* Also, Report of the Select Committee, 31 May 1856, *ibid.*; and Proceedings of the Leg. Council of India, 1854-55, pp. 781-95, and 1856, pp. 453-8.

<sup>129</sup> See Proceedings of the Legislative Council of India, 1854-55 and 1856, for the numerous petitions on the subject,

caused great concern to the Government. There was considerable doubt as to the legality of the marriages performed by Dissenting Ministers and laymen, and there was urgent need for a law to dispel such doubts.<sup>130</sup> Since marriage was a subject of universal concern, this was considered a fit subject for Imperial rather than local legislation.<sup>131</sup> A Parliamentary Commission presided over by James Stuart Wortley went into the question,<sup>132</sup> and on the basis of its recommendations an Act for Marriages in India (14 & 15 Vict., c. 40) was passed in July 1851. As provided for in the statute, the Indian Legislature passed Act V of 1852 to provide for matters of detail.<sup>133</sup> Later, Act XXIV of 1860 was passed to enable any ordained minister of the Church of Scotland to solemnise marriages instead of only Government chaplains belonging to that church doing so.<sup>134</sup>

Another subject which received great attention was the position of the native converts to Christianity. Under the personal laws of the Hindus a person renouncing his ancestral religion lost all claims to his ancestral property. The Christian missionaries regarded the position to be highly invidious and put great pressure on the Government to secure a change in the law. Under Lord Bentinck, Bengal Regulation VII of 1832 was passed, s. 9 of which sought to safeguard the property rights of converts. The full implications of the change were not appreciated at that time, and there was little opposition to the measure on the part of the public. The missionaries pressed for a similar reform in respect of Madras and Bombay. The first Indian Law Commission considered the question in connection with its *lex loci* proposals, and incorporated in the draft act a provision to safeguard the inheritance rights of converts throughout the Company's territories.<sup>135</sup> When the

<sup>130</sup> Leg. Letter to Court, 3 December (No. 20) 1838.

<sup>131</sup> Leg. Letter from Court, 1 January (No. 1) 1841.

<sup>132</sup> Second Report of the Commissioners appointed to inquire into the State and Operations of the Law of Marriages: East India Marriages (London, 1850).

<sup>133</sup> Leg. Letter to Court, 28 June (No. 12) 1852.

<sup>134</sup> Proceedings of the Legislative Council of India, 1859, pp. 857-8.

<sup>135</sup> Leg. Dep. Pros., 8 July 1842, No. 18.

report of the Commissioners and the draft Act came to be published in 1845, there was a storm of opposition.<sup>136</sup> It was represented that among the Hindus property rights depended upon a person continuing to be a member of his ancestral religion and performing the socio-religious duties expected of him, and as such the proposal was highly iniquitous and unjust. The Government was not deterred by the opposition. In Lord Hardinge's Council only T. H. Maddock questioned the justice and policy of the measure.<sup>137</sup> Lord Dalhousie and his Council were unanimously in favour of the measure, although J. D. E. Bethune had at first "some lingering doubt of the justice of the measure".<sup>138</sup> Both Lord Dalhousie and Bethune held that succession to property was not a religious question at all, but essentially a matter for the Government to decide.<sup>139</sup> Their view was indeed novel and revolutionary; if it had taken deeper root and had become the accepted policy of future administrations, it would have wholly upset the Government's professed policy of non-intervention in the religious life of the Indian communities. The Caste Disabilities Act (No. XXI) of 1850 was finally passed in the teeth of popular opposition, and gained the appellation "Hindu Black Act". It laid down that throughout the Company's territories so much of any law or usage then in force which sought to deprive, impair or affect any right of inheritance on the ground

<sup>136</sup> Leg. Dep. Pros., 2 August 1845, Nos. 79-81. Also, Memorial from the Native Christians of Calcutta, *ibid.*, No. 82.

<sup>137</sup> *Ibid.*, Nos. 29, 32 & 35-8. Also, Maddock's evidence before the Select Committee of Parliament, Parl. Papers, H. L. No. 88 of 1852, Q. 2096 & 2237-66.

<sup>138</sup> Minute dated 31 May 1849, Leg. Dep. Pros., 11 April 1850, No. 59.

<sup>139</sup> In a minute dated 26 March 1850, concurred in by two other members of the Council, Bethune wrote, "It is a sufficient recognition of the liberty of conscience if they are left undisturbed in the performance of their ceremonies, though the State takes on itself the disposal of that property, on the accumulation and distribution of which depends in a great degree the object of its institution, the well-being of the nations." And Dalhousie wrote, "I entirely agree with Mr. Bethune in the principle he lays down that it is the duty of the State to keep in its own hands the right of regulating succession to property." Leg. Dep. Pros., 11 April 1850, Nos. 83-6.

of a person renouncing his ancestral religion or caste, or his having been excluded from the communion of any religion or deprived of caste, should cease to have the force of law. Further agitation to have the measure rescinded was of no avail.

Another matter concerning the rights of the Indian Christians received attention. Sir Charles Jackson introduced a Bill in 1859 to remove the legal incapacity of a Christian convert from marrying again in case his wife refused to join him following his conversion. The Bill was not proceeded with after the first reading.<sup>140</sup> Later on, remarriage of Christian converts was permitted under the Christian Marriage Act of 1866 and the Converts Remarriage Act of 1886.

*Other measures affecting social life:* The subject of vagrancy received frequent attention. Act XXII of 1840 was passed to prevent in the Presidency towns such forms of begging which constituted a serious public nuisance, and power was also taken to extend the measure to any other town or district.<sup>141</sup> The measure was extended to Cochin in 1842 at the request of the Government of Madras,<sup>142</sup> but a proposal for its extension to Bombay was not accepted.<sup>143</sup> Act XXII of 1840 was repealed by the Police Act of 1856, which made public begging for alms in the Presidency towns and the Straits Settlements penal.<sup>144</sup> The Penal Code of 1860 covered the worst forms of vagrancy such as *dharna*.<sup>145</sup> Certain special measures were enacted for the suppression of gambling—Act IX of 1851 in respect of Bombay<sup>146</sup> and Act XXXIV of 1852 in respect of the Straits Settlements.<sup>147</sup> These measures were replaced by the provisions of the Police Act of 1856, which extended to all the Presidency towns and the Straits

<sup>140</sup> *Proceedings of the Legislative Council of India, 1859, pp. 852-7.*

<sup>141</sup> Leg. Letters to Court, 4 February (No. 8) 1839 and 8 March (No. 4) 1841.

<sup>142</sup> Leg. Letter to Court, 17 March (No. 6) 1843, para 75.

<sup>143</sup> Leg. Dep. Pros., 22 January 1848, Nos. 40-3.

<sup>144</sup> Act XIII of 1856, s. 85.

<sup>145</sup> Act XLV of 1860, s. 508.

<sup>146</sup> Leg. Dep. Pros., 11 July 1851, Nos. 1-18.

<sup>147</sup> Leg. Dep. Pros., 10 September 1852, Nos. 1-10.

Settlements.<sup>148</sup> Act I of 1856, applicable to the whole of the Company's territories, was passed for the suppression of obscene literature against the sale of which there were frequent representations.

*Education and culture:* The spread of English education had made rapid strides since the time of Bentinck, and the laws passed in 1857 for the setting up and incorporation of the Universities of Calcutta, Bombay and Madras form a great landmark in the educational history of India.<sup>149</sup> The first measure for the formation and regulation of joint stock companies, Act XLIII of 1850, provided also for the registration of literary, scientific and charitable societies. But, the provisions of this enactment were much too stringent and quite unsuited to the needs of these bodies. A special measure, Act XXI of 1860, was, therefore, passed on the lines of 17 & 18 Vict., c. 112, to improve their legal condition.<sup>150</sup>

### *General Estimate*

From this survey of the various measures enacted during the period, it will be apparent that, in spite of the many difficulties encountered and the slow progress made in legislation, quite a few important schemes of reform were got through. Among them the first place would go to the three great codes—the Penal Code and the Civil and Criminal Procedure Codes. Besides these, much useful work was done by way of consolidation, systematisation and reform in the field of limitation law, stamp law, and the law of evidence. Of the many measures introduced for the improvement of administration, particular mention may be made of those which sought to extend the powers of the subordinate judiciary and effect reforms in police and municipal administration. In the field of economic life, the measures of basic importance related to the introduction of a uniform currency throughout British India, abolition of transit and town duties, relaxation of

<sup>148</sup> Act XIII of 1856, ss. 56-66.

<sup>149</sup> Acts II, XXII and XXVII of 1857.

<sup>150</sup> Speech by E. Currie introducing the measure—Proceedings of the Legislative Council of India, 1858, pp. 719-22.

restrictions on trade by foreign (non-British) ships and on import of foreign goods of non-British origin, and adoption of a uniform customs policy. Steps were also taken to provide for the formation of joint stock companies with limited liability and for the grant of patents and copyrights. And, finally, a number of social and humanitarian measures of importance were enacted to legalise remarriage of Hindu widows, to abolish slavery, to suppress human sacrifice and infanticide, to safeguard the interests of peasants under contract to grow indigo, and to protect labourers emigrating to work on plantations outside India.

Apart from its content, the legislation of the period was noteworthy for the great improvements made in the technique of drafting laws. Prolivity and tautology were characteristic of English enactments of the day and the same weakness was noticeable in Indian legislation as well. Macaulay put up a strong fight against this tendency and endeavoured to secure conciseness in the form of laws without loss of perspicuity or clearness.<sup>151</sup> Further, on his advice, titles and preambles which accompanied legislative measures under the code of Cornwallis were dispensed with in 1834,<sup>152</sup> but the practice was revived in 1839 since the Court of Directors took strong objection to this step.<sup>153</sup> The experience gained in the framing of the Penal Code led to great improvements in the technique of drafting, the most significant being the use of illustrations, to explain the intent of enactments.

Further, in this period, there was conscious striving to obtain uniform and integrated development in the sphere of legislation. Whenever any measure came up before the

<sup>151</sup> Leg. Letter to Court, 24 August (No. 2) 1835, paras 64 & 71. Macaulay's minutes, Leg. Dep. Pros., 11 May 1835, Nos. 2 and 12, and 27 July 1835, No. 3.

<sup>152</sup> Leg. Dep. Pros., 27 July 1835, Nos. 1-6. C. D. Dharkar, *Lord Macaulay's Legislative Minutes* (O. U. P., 1946), pp. 27-9.

<sup>153</sup> Leg. Letters from Court, 1 March (No. 4) 1837, paras 23-4, and 10 May (No. 5) 1839. Leg. Letters to Court, 24 December (No. 21) 1838, and 16 September (No. 22) 1839, para 18. The last of the Acts in this series to appear without title or preamble was Act XX of 1839.

Legislative Council in respect of any one Province, all the Local Governments were consulted as to the advisability of making it a general measure. Sometimes the Local Governments concerned accepted the suggestion, and at others expressed their dissent. In coming to a final decision, the Government of India had to pay due attention to local peculiarities and problems, and it could not always wisely ignore even mere local sentiment. On the whole, the Government's policy was to attain uniformity in legislation wherever practicable and allow diversity to prevail whenever necessary. The manner in which this policy was implemented was not always consistent and correct, but the general trend was strong and clear.

The influence of English legal and judicial ideas was also marked in the legislation of the period. Earlier, such ideas had gained entry largely through judicial decisions, the rule of "justice, equity and good conscience" being applied by the Company's judges according to the notions of justice generally prevalent in England at the time. But this process was highly irregular and unsystematic. From 1834 onwards these ideas came to be adopted consciously and systematically through legislation after the consequences of such adoption had been fully examined. As explained in the earlier chapters, this period coincides with the great age of law reform in England, and the forces and ideas current there, especially the doctrines of the Utilitarians, exercised enormous influence over legislation in this country.<sup>154</sup> The presence of English lawyers on the Legislative Council and the Law Commissions did no doubt greatly assist in the understanding and assimilation of these ideas. The extent of their influence on Indian law has been well summed up by Lord Wright in these words: "The enormous sub-continent of India has adopted, except for family and other racial or religious law, the Common Law which there regulates the great mass of dealings between man and man."<sup>155</sup>

<sup>154</sup> For a special study of the influence of Utilitarian ideas on Indian Legislation, see Eric Stokes, *The English Utilitarians and India* (Oxford, 1959).

<sup>155</sup> *Legal Essays and Addresses*, Preface, p. xiii. Cited by G. C. Rankin, *Background to Indian Law* (Cambridge, 1946), p. 18. Also see *ibid.*,

While the legislative achievements of the period were of no small significance, the range of activity was very limited. This was the age of *laissez faire* and individualism; the trend was towards freeing the individual from customary checks and restraints rather than regulation of social and economic life in public interest.<sup>150</sup> Further, at this time, economic activity in India was at a very low ebb. The textile and other industries for which the country was once famous were now fast decaying as a result of the unequal competition with the manufactured goods of England. The commercial revolution which the rapid improvements in communication brought about did not commence till after the close of this period, and the rise of large scale industries was much farther off. There was, therefore, very limited demand for legislative intervention in the economic sphere. As regards socio-religious life, the traditional policy of the Government was one of non-interference. There were some important departures from this policy; but the basic approach remained unaltered and the scope of legislation in this field also was very limited.

Although the range of legislative activity was greatly restricted by the ideas and circumstances of the time, there was still considerable scope for useful work, and the Charter Act of 1833 had chalked out a major programme of legal and administrative reform. But the progress before 1854 was slow and disappointing. The changes introduced by the Charter Act of 1853 quickened the tempo of legislation and resulted in the passing of the three major codes and many other basic and useful laws. While the work of the Legislative Council at this time came in for a good deal of criticism on political and constitutional grounds, there was all-round praise for the impressive record of laws it left behind. Cecil Beadon, a member of Lord Canning's Council, expressed the view that was generally held

pp. 19-21, and L. S. S. O'Malley (Ed.), *Modern India and the West* (London, 1941), p. 112.

<sup>150</sup> "The Government of India has always reacted to views current in Great Britain, and it subscribed to the *laissez faire* doctrine during the first half of the nineteenth century and the early part of the second half." L. S. S. O'Malley (Ed.), *Modern India and the West* (London, 1941), pp. 593-6.



when he wrote, "If it be assumed that the enlargement of the Council by the addition of two of the judges of the Supreme Court and four Councillors from the different Presidencies of India was designed only as a means of improving the legislation of the country, the measure must be regarded as a complete success. The Council has done all that was expected of it, and may with just pride point to the statutes of the last seven years as a triumphant proof that the intention of Parliament has been fulfilled."<sup>160</sup> Indeed, the period may be said to constitute the dawn of the great age of law reform in India.

<sup>157</sup> Minute dated 26 January 1861, *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 53. See also minutes of Sir J. P. Grant, Sir Bartle Frere and Lord Canning, *ibid.*, pp. 31, 44 & 34 respectively.

## CHAPTER VII

### END OF THE PERIOD OF CENTRALISED LEGISLATION AND ITS SIGNIFICANCE

#### *The Indian Councils Act of 1861 and Later Developments*

WHILE the concrete achievements of the Legislative Council constituted under the Charter Act of 1853 were eminently satisfactory, the legislative mechanism had started giving trouble from the very beginning. As explained in the earlier Chapters, there were serious differences of opinion in the official circles regarding the position and powers of the Legislative Council *vis a vis* the executive government and the authorities in England. The following were the main points at issue. Did the power to enact taxation measures confer on the Legislative Council by implication the power to control public expenditure? Were there any limits to the right of its members to seek information through interpellations to enable them to discharge their legislative functions satisfactorily? Did the Court of Directors, and later the Secretary of State for India, possess a *general* power of control in legislative matters in addition to the power of veto over legislation specifically conferred by the Charter Act of 1833? Since the proceedings of the Legislative Council were open to the press and the public, the clashes arising out of these differences tended to undermine the prestige of the Government. During the earlier years, relations were not strained, but there was a major clash in respect of the Administrator General's Act of 1855. On other occasions too, the members of the Legislative Council were quite sensitive when the rights and privileges of that body seemed to be affected adversely. From the middle of 1859, the position became aggravated by the acrimonious public debates in connection with the Trades and Professions Bill, the Income tax Bill, the grant made by the Secretary of State for India to the Mysore Princes, the establishment of a

gaol for European prisoners at the Nilgiris, and the right of the Government of India in its executive capacity to "legislate" for the non-Regulation provinces. Lord Canning wrote to Sir Charles Wood that constitutional reform in India was a matter of urgent necessity and the legislative machinery as it stood could not be allowed to continue for long "without producing great inconvenience, and perhaps exciting heats which it will be difficult to allay, and which will injure and discredit us as a governing power".<sup>1</sup> The British Government was very much in sympathy with this view, and there was none in Parliament to support the claims put forward by Sir Barnes Peacock and his friends on behalf of the Legislative Council. The general opinion on the Indian question was best expressed by Earl Grey in Parliament on 26 April 1861: "He agreed . . . that it was of great importance that an opportunity should be afforded for discussing the measures proposed by the Government; but it was decidedly inconvenient that the objections to those measures should emanate from their own officers, and from persons engaged in the public service. That a judge should be the leader of the opposition was intolerable, nor could the servants of the Government be the organs through which even just objections to the measures of the Government could be brought without interfering with discipline, and with the authority which ought to be concentrated in the same authority."<sup>2</sup>

Another factor necessitating reform was the growing dissatisfaction of the Local Governments with their share in the work of legislation. Even prior to the dispute with the Madras Government over the Income Tax Bill, Lord Canning had drawn attention to the strength of this feeling. He observed that dissatisfaction must have prevailed in the Madras and

<sup>1</sup> Despatch to the Secretary of State for India, dated 15 January 1861, para 17. *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 42. Also, see opinions of Sir Bartle Frere and Samuel Laing, *ibid.*, pp. 44 & 57.

<sup>2</sup> Hansard (III Series), Vol. CLXII, p. 1169. Also, speeches by the Duke of Argyll and Lord Ellenborough (*ibid.*, pp. 1164-7), Sir Charles Wood (Vol. CLXIII, pp. 639-40), and Earl de Grey and Ripon (Vol. CLXIV, pp. 588 & 593).

Bombay Presidencies ever since the enactment of the Charter Act of 1833. So long as the Legislative Council functioned behind closed doors, this feeling was comparatively suppressed, but with the changes introduced in 1853, it had become "strong and unconcealed". "Without attaching weight to hasty and mistaken complaints made of the proceedings of the Legislative Council," he wrote, "I cannot be surprised that Madras and Bombay should see with impatience their questions of internal administration, municipal questions, and matters of police discussed and decided in the minutest detail by a body in which officers of Bengal, or acquainted with Bengal alone, have so strong a preponderance." The solution lay, according to him, in transferring the responsibility for local legislation to the subordinate Governments, subject to certain restrictions.<sup>3</sup> Sir Bartle Frere expressed the same sentiments in his minutes and in his correspondence with Sir Charles Wood.<sup>4</sup> The controversy over the Income Tax Bill and the recall of the Governor of Madras, Sir Charles Trevelyan, brought into the open much of the suppressed feelings on the subject. It was generally felt that some steps should be taken urgently to allay the fears and satisfy the claims of the Local Governments.<sup>5</sup>

Apart from these stresses and strains within the framework of the official government, there was public opinion in the country to consider. The non-official European community was powerful and well-organised. Although it had failed to secure a seat in the Legislative Council both in 1833 and in 1853, it wielded great influence over the Government, both in India and England. With the prestige of the Government at a low ebb after 1857, the virulence of its attack greatly increased, and the force of its demand for admission into the

<sup>3</sup> Despatch to the Secretary of State for India, 9 December 1859, paras 10-12.—*A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), pp. 35-6.

<sup>4</sup> *Ibid.*, pp. 45-6 & 50. John Martineau, *The Life and Correspondence of the Rt. Hon. Sir Bartle Frere*, Vol. I (London, 1895), pp. 311 & 350-1.

<sup>5</sup> Despatch to the Secretary of State for India, dated 15 January 1861, paras 1-2.—*A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), pp. 39-40. Also, minute by Samuel Laing, *ibid.*, pp. 57-8.

Legislative Council gained greatly in strength.<sup>6</sup> The position of Indians had also greatly altered since the enactment of the last Charter Act. The rapid growth of political consciousness among those who had the benefit of English education and all those who came within the sphere of their influence,<sup>7</sup> and the steady growth of political organisations such as the British Indian Association, made it imperative that the question of representation of the Indian subjects in the Legislature should receive more serious attention than before. But, of far greater significance was the rising of 1857 which rudely shook the self-complacency of the Anglo-Indian rulers. The Government was now less sure of the ability of its covenanted European officers to understand and interpret the thoughts and feelings of the Indian community, and it became greatly conscious of the necessity for securing public support to its proceedings. Sir Charles Wood said in Parliament that the one great object of the reforms was to conciliate the masses and "to obliterate the distinction between the conquerors and the conquered in India". He felt that a greater association of Indians with the administration "would afford the best

<sup>6</sup> Referring to the growing hostility of Englishmen and the English press in India, Sir Bartle Frere wrote, "No numerical comparison with other portions of our Indian population can give any idea of the power of this 'public'. It can be judged only by those who know practically the difference in the trouble of managing millions of natives as compared with one discontented non-official Englishman with a real grievance." Minute dated 16 March 1860, para 13, *ibid.*, p. 44.

<sup>7</sup> Referring to the political awakening among Indians, Sir Bartle Frere wrote, "I know few things more striking than the change which has come over the natives in this respect. Twenty years ago they were remarkable for their general indifference to all public questions which had no immediate local bearing. But this indifference has given place among the more intelligent classes to a feverish curiosity, which has of late years frequently struck me as one of the most noteworthy changes in the general characteristics of native society." Para 15 of the minute, *ibid.* Samuel Laing drew attention to the growing political tension, and observed, "Public opinion is at present in a state to accept moderate measures with satisfaction. A few months later, and with an irritating struggle once engaged, it will infallibly demand more, and give the Government no credit for concessions which it considers to have been reluctantly extorted." Minute dated 28 January 1861, *ibid.*, p. 59.

security for the permanence of our rule, for it would make the highest class of natives, as well as those of low degree, feel that their own good was bound up in the continuance of our sway".<sup>8</sup> Thus, within seven years after the passing of the Charter Act of 1853, these forces made introduction of fundamental changes in the legislative system of the country necessary.

The subject of reform was taken up soon after the transfer of Indian administration from the Company to the Crown, and the views of the Government of India on the subject were sought in 1859. The proceedings of the Legislative Council during this year and the succeeding one impressed upon the British Government the urgency of the matter. There were no elaborate enquiries and investigations such as those which preceded earlier reforms, and the Indian Councils Bill was based mostly on the recommendations of Lord Canning in his despatches of 1859 and 1861.<sup>9</sup> The measure had an easy passage through Parliament, received royal assent on 1 August 1861, and came into force at the close of the year.

This enactment laid down the basic principles of the legislative system of the country down to 1919. The first principle was that legislation on local matters should be the concern of the Local Governments, and the Government of India should confine itself to matters of all-India concern. This change was rendered necessary, as already noted, by the growing dissatisfaction of the subordinate Governments with the very limited share they had in the framing of laws concerning themselves. A further expansion of the Legislative Council of India to include a large number of provincial representatives, official and non-official, was a possible solution; but it was not favoured because of the many difficulties in the way of maintaining such a body at Calcutta and also the expense involved.<sup>10</sup> It was, therefore, considered best to decentralise

<sup>8</sup> Hansard (III Series), Vol. CLXIII, p. 1026.

<sup>9</sup> Sir Charles Wood's letter to Sir Bartle Frere, 17 August 1861—John Martineau, *The Life and Correspondence of the Rt. Hon. Sir Bartle Frere*, Vol. I (London, 1895), p. 344.

<sup>10</sup> Sir Charles Wood's speech at the first reading of the Bill, Hansard (III Series), Vol. CLXIII, pp. 640-1. Also, Lord Canning's despatch to

the work of legislation and establish Local Legislatures. Lord Canning did not expect the quality of laws to improve by this change; he proposed it only as he considered the measure best calculated "to convert jealousy and antagonism (no matter whether justly or unjustly felt) into wholesome rivalry and co-operation" among the Provinces.<sup>11</sup> One of the members of his Council, Samuel Laing, however, expected more positive benefits to accrue from it.<sup>12</sup>

Accordingly, in pursuance of this policy, the Act of 1861 remodelled the Governor General's Council for legislative purposes, and also set up immediately Local Legislatures in Madras, Bombay and Bengal. Other Local Legislatures were established in subsequent years under the powers conferred by the Act, and by 1919 there were eight such bodies in the different Provinces. While the object in view was clear, the Act did not draw up separate lists of Central and Provincial subjects. Both the Legislatures were given concurrent jurisdiction over all subjects,<sup>13</sup> but their territorial jurisdictions were different: the Local Legislatures could enact laws only in respect of their respective Provinces, while the authority of the Central Legislature extended over the whole of British India. Where Central and Provincial laws came into conflict, it was provided that the former should prevail over the latter.<sup>14</sup> The Governor General's assent was necessary before either

the Secretary of State for India, 9 December 1859, paras 12-13, *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 36.

<sup>11</sup> *Ibid.*, p. 34.

<sup>12</sup> In his minute dated 28 January 1861, Laing wrote, "I hold it extremely desirable to avoid undue centralisation, to encourage local self-government, and to break up a system which, in the attempt to enforce a barren uniformity throughout an empire comprising elements as distinct as those of the different nations of Europe, stifles all local action, and destroys all local responsibility." *Ibid.*, p. 58.

<sup>13</sup> The only difference was in respect of Parliamentary statutes passed before 1861. The Provincial Legislative Councils had no authority to make any law affecting them, but the restriction did not apply to the Governor General in Council, subject to certain important exceptions. 24 & 25 Vict., c. 67, ss. 22 & 42.

<sup>14</sup> *Ibid.*

Central or Provincial measures, duly passed by the concerned Legislatures, became law.<sup>15</sup> Further, the Local Legislatures could take into consideration the following subjects of all-India concern only with the prior sanction of the Governor General; public debt of India; customs and other taxes imposed by the Government of India for non-local purposes; coinage and currency; posts and telegraphs; the penal code; religion and religious rites and usages; the army and the navy; and patents and copyrights.<sup>16</sup> These provisions provided the necessary checks to prevent the Central and Local Legislatures from trespassing into each other's legitimate field of activity. They also made it possible for the Government of India to exercise control over provincial policies to ensure development on right lines and to enforce a certain degree of basic uniformity in legislation. In law, the form that central control could take was narrow and rigid, but, in practice, the opportunities to influence, and even control, were many and various. In particular, in the absence of effective decentralisation in respect of administration and finance down to 1920, the Government of India had the final voice in most matters. During the first three decades following the Act of 1861, the spirit of the policy behind decentralised legislation was very much respected.<sup>17</sup> But, in the subsequent period, the growth of the nationalist movement and the strengthening of the popular element in the Legislative Councils led to a tightening of the central control.<sup>18</sup> Although the Decentralisation Commission of 1907-09 examined ways and means of relaxing it, some real relief came only ten years later with the acceptance of the ideology of progressive realisation of responsible government and the introduction of dyarchic government in the Provinces.<sup>19</sup>

Appointment of non-official persons to the Legislatures was another important principle adopted in 1861. One of the objects in view was to ascertain through them the reactions of the public

<sup>15</sup> *Ibid.*, s. 40.

<sup>16</sup> *Ibid.*, s. 43.

<sup>17</sup> Bisheshwar Prasad, *The Origins of Provincial Autonomy* (Allahabad, 1941), pp. 54-62 & 176-81.

<sup>18</sup> *Ibid.*, pp. 208-15.

<sup>19</sup> *Ibid.*, pp. 321-4 & 375-6.



to measures under consideration. But of no less importance was the desire to assuage the extreme bitterness caused by the rising of 1857 and to win public confidence by enlisting the support of some leading men of the community by nominating them to the Legislatures. The vision of popular government for India was only in the minds of a few radicals and enthusiasts,<sup>20</sup> and four more decades were to elapse before the question entered the realm of practical politics. In the opinion of Sir Charles Wood, it was "simply and utterly impossible" to provide for the "representation" of the Indian community under the prevailing circumstances of the country. The representation of the English settlers might have been obtained easily, but he had the strongest objection to transfer power into their hands.<sup>21</sup> Therefore, there was no question at this time of the Central or Provincial Governments in India foregoing any part of their authority or responsibility in favour of a popular body. The object in view was not "responsible" government, but a government "responsive" to public opinion. This was the keynote of the Government's policy down to 1919.<sup>22</sup>

<sup>20</sup> W. E. Gladstone, later Prime Minister of England, quoted with approval the view of Halliday, "I believe that our mission in India is to qualify the natives for governing themselves." Hansard (III Series), Vol. CL, p. 1622. Hurrish Chunder Mookerji, Editor of *The Hindu Patriot*, declared, "What we want is not the introduction of a small independent element in the existing Council, but an Indian Parliament." He laid stress in his writings on the deeper problem of Indian unity and the need for finding a common language. Ners Chandra Sen Gupta, *Selections from the Writings of Hurrish Chunder Mookerji* (Calcutta, no date), p. 215 and Addenda, p. xx.

<sup>21</sup> Hansard (III Series), Vol. CLXIII, pp. 641-2. See Wood-Frere correspondence in which both expressed their strong opposition to the "Colonial Policy", "a policy which puts all real power into the hands of European officials and European colonists, and treats the natives as at best in *status pupillari*, to be ruled, taught and perhaps petted, but to be excluded from all real power or influence . . ." Martineau, *The Life and Correspondence of the Rt. Hon. Sir Bartle Frere*, Vol. I (London, 1895), pp. 344-6.

<sup>22</sup> Canning and his Council were unanimously in favour of associating non-officials, and the proposal received almost unanimous support in Parliament. The continuance of the system of conducting proceedings in public also received general support, although many had their own misgivings. In Parliament, there was a move to lay down in the statute

Accordingly, while non-officials were called in to assist in the work of legislation, the Act of 1861 took care to secure the authority of the Government by maintaining a majority of officials in the Legislative Councils, both at the Centre and in the Provinces. Even fifty years later, under the reforms of 1909, an official majority was maintained in the Central Legislature; and a nominated majority composed of officials and non-officials was maintained in the Provincial Legislatures except in Bengal which had a narrow elected majority. Under the Act of 1861, non-officials were wholly nominated by the Governor General or the heads of the Local Governments concerned, and an element of elective representation was introduced under the reforms of 1892 and 1909. Though the progress was slow and halting, the development of the representative system which commenced in 1861 prepared the ground for the beginnings of responsible government in 1919.

The Act of 1861 is also noteworthy for setting largely at rest the doubts entertained as to the powers of the Legislative Council of India and for placing the new legislative bodies clearly and unambiguously under the control of the executive governments in due subordination to the authorities in England. This was accomplished not so much by incorporating a clear provision to this effect in the statute as by the various changes effected in the legislative system. First of all, an official majority was maintained in all the Legislative Councils, and *this secured in full the authority of the Government*. Even after the official members ceased to command a majority, the official bloc was large enough to get through all Government measures with the assistance of the nominated non-official members, whose support could normally be relied upon. It may be noted, however, that the members of the Legislative Councils, official and non-official, were normally expected to

that one-half of the non-officials nominated to the Council should be Indians. Sir Charles Wood opposed it on the ground that it would introduce an element of racial discrimination, and "there ought to be no legal distinction between any class of Her Majesty's subjects, whatever their colour, creed or race". He gave an assurance that the Indian subjects would be adequately represented. *Hansard (III Series), Vol. CLXIII, pp. 1350-4.*

exercise their individual judgment in all matters,<sup>23</sup> and it was doubtful if the Government was legally competent to direct the official members to speak and vote in a particular way.<sup>24</sup> But, in practice, the official members were required to vote with the Government in respect of every measure to which it attached importance, and only a few could resist the pressure. Again, the Act of 1861 expressly laid down that the Legislative Councils should not transact any business other than the consideration and enactment of measures introduced into them for the purpose of enactment.<sup>25</sup> The object of this provision was, as explained by Sir Charles Wood, "to prevent the legislature from interfering with the functions of the executive government".<sup>26</sup> A limited right to ask questions and to discuss the budget was granted in 1892, but there was no danger of

<sup>23</sup> While forwarding a copy of the new statute, Sir Charles Wood observed, "Members of the Council will, of course, exercise their independent judgment in regard to matters brought before them, but the Council at its meetings for making laws and regulations is not to be a body separate and distinct from the Council of the Governor General". Despatch to the Government of India, dated 9 August 1861, para 23, *ibid.*, p. 73.

<sup>24</sup> In his despatch of 14 May 1868, the Secretary of State for India observed that it was highly essential that members of the executive government should act together in the Legislative Council, but he was afraid "that an attempt to impose authoritative restrictions upon the discretion of members of a legislative assembly, in the exercise of their functions, must destroy its character and usefulness". But, in the despatch of 24 November 1870, the Secretary of State for India stated that the final control and direction of the affairs of India rested with the Home Government and not with the authorities in India, and that "that Government must hold in its hands the ultimate power of requiring the Governor General to introduce a measure, and of requiring also all the members of his Government to vote for it". He made it clear that the Act had made "no change in the relations which subsist between the Imperial Government and its own executive officers" even in respect of legislative matters. Presumably, in taking this stand, he relied upon s. 80 of the Charter Act of 1833 as interpreted by the Law Officers of the Company and the Crown in 1847. *Ibid.*, pp. 173 & 274.

<sup>25</sup> 24 & 25 Vict., c. 67, ss. 19 & 38.

<sup>26</sup> Despatch dated 9 August 1861, para 24, *A Selection of Papers relating to the Constitution and Functions of the Indian Legislative Councils* (Calcutta, 1886), p. 73.

the Legislative Councils becoming "little Parliaments" and seeking to control the executive governments. And, finally, the elaborate forms of procedure which were in force since 1854 were given up, and a simpler form suited to a Parliamentary committee was adopted.<sup>27</sup> To prevent the Legislatures from getting out of control, the assent of the head of the Government concerned was made necessary for any modification in the prescribed procedure.<sup>28</sup>

To sum up, the year 1861 is a great landmark in the history of the legislative system in India. With it the period of centralised legislation, which has been the subject matter of our study, came to an end, and the era of decentralised legislation, subject to varying degrees of central control over local legislation, commenced. Further, the representative system in India began with it, although in a halting and indirect way, and the new ideal was to make the Government "responsive" to public opinion without in any way affecting its supremacy or authority.

### *Significance of the Period of Centralised Legislation*

We may now conclude this study with a recapitulation of the main trends of development during the period and an assessment of their significance in the perspective of history. First of all, prior to 1834, the Governments of the three Presidencies of British India were largely independent of each other, and the Governor General in Council of Bengal exercised only general powers of supervision and control over the other two Presidencies, which in practice were not very effective. The Charter Act of 1833 established a highly centralised system of administration, and the Local Governments were virtually reduced to the position of mere agents. The attempt to govern a big continent like India from one centre was bound to be a matter of extreme difficulty and the demand for relaxation of control increased as years passed and as administration became more and more complicated. The first step in decentralisation

<sup>27</sup> *The Indian Councils Act and Rules and Orders for the Transaction of Business in the Council of the Governor General* (Calcutta, 1868).

<sup>28</sup> 24 & 25 Vict., c. 67, ss. 18 & 37.

was taken in the sphere of legislation in 1861 and this was followed by Lord Mayo's measures to relax control in financial matters in 1870. There was a set-back in the time of Lord Dufferin, and under Lord Curzon "effective centralisation reached its climax".<sup>29</sup> Although the subject of decentralisation received continuous attention and the Decentralisation Commission of 1907-09 went into the question in a thorough and comprehensive manner, there were limits beyond which relaxation of control could not go in view of the responsibility of the Government of India for the efficient administration of the country as a whole to the Secretary of State for India and through him to Parliament. To overcome this difficulty, and also in view of the political developments in the country, the ideology of gradual evolution of responsible government was accepted in the historic announcement of Montagu in 1917, and a beginning in the transfer of responsibility to Indian hands was made under the Montagu-Chelmsford Reforms of 1919. From the time of the enactment of the Charter Act of 1833 to this date, it may be said that British India had a centralised system of administration with the Local Governments playing a subordinate role. The degree of central control varied from time to time, but the system was basically one of extreme concentration of governmental authority and responsibility. The maintenance of such a form of administration for nearly a century is of the highest historical significance as it was a major factor in welding India into a nation. Centralised legislation during 1834-61 and central control over local legislation during 1862-1920 were facets of this larger development. The laws and institutions which were developed during this period and in subsequent years run through India's body politic like so many veins and contribute towards the organic unity of the people of the country. More particularly, the period is noteworthy for the great struggle between the old and new schools of thought, the paternalists and the Benthamites, in respect of codification and law reform, and its closing years witnessed the dawn of the great age of law reform in India.

<sup>29</sup> Bisheshwar Prasad, *The Origins of Provincial Autonomy* (Allahabad, 1941), p. 258.

Again, the period is of great significance from the point of the development of democratic institutions. Prior to the Charter Act of 1833, although the legislative function was somewhat differentiated from the executive duties of the Government by the special procedure followed in the framing of Regulations, the body for both the purposes was one and the same. With the appointment of the Fourth Member to assist in the work of legislation, the Indian Legislature as an independent unit of Government took its birth, and the changes effected in its composition in 1854 stressed further its separateness from the executive government. Throughout this period, it was a purely "official" body, but the manner in which it worked was of great importance for the future of democracy in the country. The procedure introduced in 1835 laid stress on "due deliberation" and "wide consultation" as the two cardinal principles of the legislative process. By the publication of *Bills in advance of enactment*, the public were given an opportunity for the first time to express their views and sentiments. Another important step, namely, the admission of the public to witness the proceedings of the Legislative Council, was taken in 1854; and, again, press reporting was permitted in 1856. These were bold decisions with far-reaching results. When in 1862 a few non-officials were nominated to the Legislative Councils and the representative system in India took its birth, the public were in a sense walking from the lobby into the chamber proper.

The activities of the "official" Legislature were significant from another point also. From the very beginning, it claimed that the authorities in England had no right to dictate what laws it should pass, and that the right of general supervision and control they had over the executive government did not extend to the sphere of legislation. This claim was publicly asserted in 1855 and the British Government was obliged to acquiesce for the time being. Again, soon after the Legislative Council was further expanded in 1854 and the members of the executive government ceased to hold a dominant place in it, the fight for supremacy between the two bodies commenced. The Legislative Council seemed to get the upper hand at first, because of its power to grant or withhold sanction to taxation

Bills. If this power had been allowed to develop, it would have indeed become a "little Parliament", as it was derisively called. In spite of its purely official membership the Council maintained a high tradition of independence, and the spirit of it was not wholly lost in the subsequent years when conditions were not so propitious.

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UNIVERSITY OF JODHPUR LIBRARY

# INDEX

- Aberdeen, Lord, 69  
 Abkary & excise, 112, 127-8, 307-8  
 Academic Association, 76  
 Acharyya, B. K., 3, 19, 23, 40, 87, 116, 286  
 Acts (British Parliament)  
   13 Geo. III, c. 63 (Regulating Act) — 3-9, 15-16, 18, 29, 61  
   21 Geo. III, c. 70 — 7-10, 13, 17-18, 62  
   26 Geo. III, c. 16 — 114  
   33 Geo. III, c. 52 (Charter Act of 1793) — 14-15, 113-14, 277  
   37 Geo. III, c. 117 — 293  
   37 Geo. III, c. 142 and 39 & 40 Geo. III, c. 79 — 11  
   47 Geo. III, c. 68 — 11, 254, 297  
   47 Geo. III, sess. 2, c. 68 — 11  
   53 Geo. III, c. 155 (Charter Act of 1813) — 11-12, 29, 284-5  
   4 Geo. IV, c. 83 and 6 Geo. IV, c. 94 — 300  
   3 & 4 Wm. IV, c. 41 — 289  
   3 & 4 Wm. IV, c. 105 & 106 — 282  
   5 & 6 Wm. V, c. 6 — 239  
   6 & 7 Wm. IV, c. 114 — 283  
   7 Wm. IV & 1 Vict., c. 73 — 254  
   1 Vict., c. 26 — 281  
   3 & 4 Vict., c. 37 — 271  
   3 & 4 Vict., c. 56 — 294  
   3 & 4 Vict., c. 85 (Charter Act of 1833) — *passim*  
   5 & 6 Vict., c. 39 — 300  
   7 & 8 Vict., c. 110 — 298  
   11 & 12 Vict., c. 21 — 267, 283  
   12 & 13 Vict., c. 29 — 295  
   12 & 13 Vict., c. 43 — 271  
   12 & 13 Vict., c. 83 — 300  
   14 & 15 Vict., c. 40 — 314  
   16 & 17 Vict., c. 95 (Charter Act of 1853) — *passim*  
   17 & 18 Vict., c. 5 — 295  
   17 & 18 Vict., c. 112 — 317  
   19 & 20 Vict., c. 47 — 298  
   20 & 21 Vict., c. 66 — 271  
   24 & 25 Vict., c. 67 (Indian Councils Act of 1861) — 84, 139, 257-9, 265, 271  
   24 & 25 Vict., c. 74 — 271  
   28 Vict., c. 17 and 32 & 33 Vict., c. 98 — 265  
 Acts (Central)  
   1834 — I, 239  
   1835—I, 237; II, 283; IV, 280; VII, 283; XI, 276; XIII, 275; XVI, 304; XVII, 130, 235, 292; XX, 273; XXI, 123, 235, 292  
   1836—III, 123; V, 284; X, 305; XI, 285; XIII, 292; XIV, 293-4; XV, 283; XVII, 270; XVIII, 301; XIX, 297; XXII, 302; XXIII, 272; XXIV, 285, XXX, 263, 275-6; XXXII, 125, 295  
   1837—I, 280; II, 301; IV, 187, 231, 296-7; V, 302; VII, 255; VIII, 123; IX, 287; XI, 123; XIV, 294; XV, 296; XVII, 301; XVIII & XIX, 275; XXIV, 273; XXV, 284; XXIX, 291; XXX, 273; XXXII, 302; XXXIV, 284; XXXVII, 289  
   1838—I, 293; III, 128; V, 298; VIII, 128, 301; X, 283; XIX, 127; XXIV, 297; XXV, 281; XXXI, 281  
   1839—I, 128, 307; II, 205; III, 112, 285; V, 112; VI, 254, 297; VII, 128; X, 264; XI, 231, 289; XIV, 303; XV, 295; XVIII, 275; XX, 307, 318; XXI, 198, 280; XXII, 283,

- 291; XXIV, 232, 271-2; XXVII, 291; XXIX, 281; XXX, 282
- 1840—I, 205, III, 254, 297; IV, 305; V, 205, 248; VI, 300; VIII, 127, IX, 282; X, 311, XIII, 299; XIV, 300; XXII, 316; XXIII, 290; XXIV, 277
- 1841—I, 306; III, 280; V, 291; VI, 295; VII, 206, 291; X, 294; XI, 232; XII, 306; XXII, 277; XXIII, 295; XXIV, 282; XXXI, 237, 289
- 1842—I, 127-8; III, 280; X, 278; XI, 295; XIII, 307; XV, 303
- 1843—I, 238, 299; III, 204, 288; IV, 286; V, 113, 193; VI, 284-5; VII, 203, 283; IX, 254, 297; XI, 128, 307; XII, 291; XV, 284, XVIII, 264, 276; XIX, 238, 299; XXI, 303; XXIV, 263, 275-6
- 1844—I, 232; II, 231, 289; III, 235-6, 287; VI, 293; VII, 282; XI, 280; XII, 271; XVI, 130; XVII, 258; XVIII, 274; XIX, 293; XX, 299; XXII, 292
- 1845—I, 306, IV, 238, 299; VII, 302; XI, 277; XIX, 115, 254, 285, 296, 288; XX, 236, 271, 287; XXI, 312; XXIII, 254, 298; XXVIII, 280; XXXII, 308
- 1846—I, 291; IV, 206, 307; X, 306; XI, 271
- 1847—VI, 292; VIII & XIII, 303; XVI, 277; XVIII, 299; XIX, 271; XX, 299; XXI, 280
- 1848—III, 275; VI, 295; VIII, 306; IX, 277; XI, 275; XVII, 309; XXII, 283; XXVI, 280; XXVII, 271
- 1849—I, 264, 276; II, 239 VIII & IX, 280; XI, 308; XIV, 266
- 1850—III, 285; V, 295; IX, 201, 239, 280; XI, 232, 294; XIV, 280; XVII, 300; XIX, 208; XXI, 90, 315; XXVI, 129, 278; XXVII & XXVIII 305; XXXVIII, 291; XLII, 300; XLIII, 254, 296, 298, 317
- 1851—IV & VII, 284; VIII, 301; IX, 316; XI, 299; XIV, 128 308; XV, 300; XVI, 291
- 1852—III, 308; IV, 303; V, 314; VI, 282; XI, 307; XV, 282, 289; XVI, 289; XVII, 282; XIX, 308; XX, 300; XXIV, 304; XXVII to XXIX, 273; XXX, 257; XXXIII, 290; XXXIV, 316
- 1853—I, 287; II, 296; III, 301; VII, 286; VIII, 258; X, 302; XII, 301; XIX, 290; XX, 291
- 1854—VI, 282; VII, 276; IX, 289; XII, 284; XVII, 301; XVIII, 300; XIX, 295; XXI, 297; XXIII & XXIV, 272; XXX, 293; XXXI, 282; XXXIV, 301
- 1855—II, 282, 290; III, 266; IV, 255, 298; V & VI, 282; VIII, 241-3, 245; IX, 289; X, 290; XI, 282; XVII, 292; XVIII, 255; XXII, 301, XXIV, 145; XXV, 149; XXVII, 297; XXVIII, 300; XXXII, 160, 302; XXXIV, 290
- 1856—I, 317; II, 149; 291; V, 272; VI, 163, 245, 296; VII, 163; VIII, 274; XI, 266; XIII, 274, 281, 316-17; XIV, 277; XV, 313; XVII, 276; XIX, 304; XX, 278; XXI, 308; XXII, 302, XXIII, 163, 307; XXV to XXVIII, 277-8; XXIX, 299
- 1857—II, 317; VI, 300; VII, 284; IX, 246; XIII, 308; XIV to XVII, 272; XIX, 254, 298; XXI, 151; XXII, 317; XXV, 272; XXVII, 317; XXVIII & XXXIII, 272
- 1858—I, 302; III, V, X-XI, XX & XXII, 272; XXIII, 270; XXV, 278; XXVIII, 274; XXIX, 272; XXX, 247; XXXIX, 307
- 1859—I, 305; II, 163; III, 299; VII, 162, 295; VIII, 288; X, 306-7; XI, 306; XII, 149; XIV, 207, 288; XV, 246, 299; XVI, 246-7; XVII, 308; XIX; 163; XX, 272; XXIV, 273
- 1860—VII, 254, 298; VIII & IX,

- 301; X, 162; XI, 249-50, 296; XX, 257; XXI, 317; XXII, 271; XXIV, 314; XXIX, 163; XXXII, 309; XXXIV, 272; XXXVI, 163, 208, 309; XXXVII & XXXVIII, 248; XL, 163; XLV, 286, 312, 316; XLVI, 303; LI, 163  
 1861—I, 280; V, 273; XVIII, 309; XXIV, 297; XXV, 288; XXIX; 271  
 1862—II, 309; XVII, 238  
 1863—VI, 295, 307; XX, 311  
 1864—XVI, 239, 299  
 1867—V, 286  
 1869—XXII, 268  
 Administrator General, law re., 229, 241-3, 245, 322  
 Admiralty jurisdiction, 230, 260-1, 263  
 Agra, 44, 68, 112; also North-Western Provinces  
 Ahmednagar, 271  
 Aliens, legal position, 256-7  
 Allahabad, 43, 311  
 Allegiance, law of, 60, 265-6  
 Americans, 284-5  
 Amherst, Lord, 276  
 Amos, Andrew, 102, 108, 168, 171, 173-4, 178-9, 182-3, 187, 190, 192, 195, 198-9, 202, 205-6, 214-16, 220, 253, 259, 263-4, 281  
 Anderson, G. W., 169  
 Anglo-Indians, 23, 26, 66, 69, 179, 194-5, 208, 287, 305  
 Anjengo, 123, 128  
 Antilles, 303  
 Appeals (judicial), 4, 9, 203-4, 231, 237-8, 288-9  
 Apprenticeship, 305  
 Arakan, 293  
 Argyll, Duke of, 225, 323  
 Armenians, 21, 26, 69, 194-5, 284, 287  
 Arms & Ammunitions Bill, 137, 149  
 Army, 12, 46, 226, 235-6, 267, 271-2, 286-7, 328  
 Articles of War, see Army, Navy  
 Arts, Trades & Professions Bill, 137, 140, 149, 164, 309-10, 322  
 Assam Company, 112-15, 227, 232, 236, 254, 285, 296, 298  
 Auber, Peter, 40, 44, 51  
 Auckland, Lord, 22, 109; Fourth Member, 101, 107, 172-4; Law Commission, 167-8, 170, 172-4, 176, 179, 214-15, 219; Penal Code, 181-3; slavery, 192-3; *Lex Locif*, 195; other measures, 197, 205, 235, 281, 303  
 Azim Jah, Prince, 160, 246-7  
 Baden-Powell, B. H., 306  
 Bagal, J. C., 77  
 Baird, J. G. A., 146, 185, 189  
 Ball, U. N., 61  
 Banerjea, P. N., 295, 305, 309, 311  
 Banks & joint stock companies, 11, 232, 254-5, 292, 296-8, 318  
 Baring, T., 69  
 Barwell, 7, 48  
 Bax, John, 42-3  
 Bayley, W. B., 42-3  
 Beadon, Cecil, 84, 143-4, 249-50, 320  
 Beaufort, F. L., 10  
 Begging & vagrancy, 316  
 Bengal British India Society, 77  
 Bengal Presidency, 273-4, 289-90, 293, 308 & *passim*  
 Bentham, Jeremy, & Benthamism, 34-9, 54, 76, 108-9, 118, 126, 177-80, 182, 211-13, 223, 274, 319, 333  
 Bentinck, Lord, 15, 109, 151; Charter Bill, 24, 28, 30, 38, 42-3, 47, 49, 56, 65 6, 74, 76; Fourth Member, 56, 95-6, 98-101, 106, 173; Law Commission, 167-8, 170, 173, 179; legislation, 120, 151, 176, 276, 283, 286, 304, 311, 314  
 Bethune, John Drinkwater, 105-8, 184-6, 188-9, 208, 222, 228-9, 232, 237, 257, 259, 261, 266, 268, 298, 309, 315  
 Bird, W. W., 71, 73, 83, 102-3, 111,

- 173, 179, 191-2, 195, 215, 218,  
220-1, 236
- Blackett, J. B., 67, 70, 82
- Board of Control, 11, 15, 19, 46, 50-  
2, 62-4, 78, 81, 117, 223 & *passim*
- Bombay Association, 78
- Bombay Presidency, 8, 13, 55, 122,  
125, 130, 190, 239, 273-5, 277-8,  
289-90, 300, 307 & *passim*
- Bore Ghat, 128, 130, 301
- Borradaile, H., 169, 171
- Bright, John, 67, 70
- Britain, 27, 62-3, 293-5 & *passim*;  
law reform in, 36-7, 108, 184, 210
- British Guinea, 303
- British Indian Association, 75, 77-8,  
90, 122, 155-6, 158, 160, 325
- British India Society, London, 77
- Brougham, Lord, 37
- Broughton, Lord, see Hobhouse.
- Brunyate, J. B., 197
- Buckingham, James Silk, 16, 53, 81,  
276
- Buddhists, 188
- Budget & finance, 27-8, 139-43, 159,  
309; also Taxation
- Calcutta, 23, 159, 197, 277-8, 291 &  
*passim*
- Cameron, Charles Hay, 14; Char-  
ter Act, 71, 81; powers of Court  
of Directors, 227, 229, 231, 236;  
scope of legislative authority,  
231, 252, 254, 259, 263-4, 266;  
Fourth Member, 96, 104, 5, 108,  
110-11; First Law Commission,  
169, 171, 174-80, 211, 213, 215, 17,  
219-21; Second Law Commission,  
86, 223-4; Penal Code, 183-4, 186;  
other measures, 193, 196, 201, 289,  
311
- Campbell, A.D., 31, 44
- Campbell, Sir George, 142
- Canning, Lord, 69, 84, 137, 139, 144,  
146-7, 150-1, 157-8, 160-1, 242,  
295, 320-1, 323, 326-7, 329
- Cantonments, 230, 261, 265, 271
- Carnatic, Nawab of, 64, 160, 163,  
232, 246-8
- Casement, W., 102, 111, 215, 220
- Cattle duty, 123
- Centralisation, administrative &  
legislative, 14-16, 28, 32-3, 41-6,  
49-51, 59, 71-2, 126-33, 326-8,  
332-5
- Ceylon, 48, 303
- Charter Acts, see Acts (British  
Parliament)
- Charters, E. I. Company's early, 1-3,  
5, 16
- Chaudhuri, S. B., 26
- Chaukidars, law re., 112
- Chaukidari tax, 296
- Changancheri, 123, 18
- China, 27-9
- Chittagong, 271
- Christians, Indian, 20, 23, 26, 76, 90,  
194-5, 287-8, 313-16
- Civil Finance Committee (1828), 28,  
40-2
- Civil procedure, 19, 22-3, 280-2, 288-  
91; also Codes
- Civil services, 34-5, 40, 65-7, 76, 81,  
168, 296
- Clarke, Sir Richard, 53-4
- Clerke, Sir George Russell, 80
- Clive, Robert, 3, 18
- Cobden, Richard, 70
- Cochin, 128, 316
- Codes, 10, 317; need for preparing,  
24-5, 31-2, 51, 55-6, 63, 85; general  
policy re. preparation of, 109,  
174-80, 212; Elphinstone's Code,  
21, 40, 55, 169, 283; Civil &  
Criminal Procedure Codes, 160,  
169, 176-80, 184, 203, 223-5, 279,  
284-5, 288, 317, 320; Penal Code,  
113, 177, 8, 180-9, 192, 194, 210-  
11, 214, 223, 231, 233, 250, 261-2,  
265, 6, 286-7, 297, 302, 312, 316-  
18, 320, 328; codification of the  
substantive laws of the Hindus &

- Muhammadans, 179, 194, 209, 212, 224, 287; also Law Commissions, *Lex Loci*
- Coinage and currency, 22, 123, 130, 164, 226, 235, 292-3, 297, 317, 328
- Colaba, 258
- Colebrooke, Sir, T. E., 38
- Colonies, emigration to, 231, 234, 302 4, 312, 318
- Colwin, 185
- Commutation & pardon, 230, 255
- Contracts, laws re., 23, 208, 249, 304-5
- Coorg, 98
- Copyrights, 298-9, 318, 3. 8
- Cornwallis, Lord, 10, 29, 36, 116; Code of, 10, 17
- Corporal punishment, 151, 226, 234-6, 239, 272, 286-7
- Corporal rights, grant of, 89, 165, 227, 230-2, 253-5, 285, 297-8
- Court of Directors, 27 & *passim*; relations with Government of India, 2-5, 10-11, 15-16, 29, 50, 52, 61-3, 78, 88-9, 92-3, 113-16, 137-8, 226-51, 254, 322; centralisation, 28, 32, 45-6, 126; Legislative Council, 81-2, 147; Fourth Member, 32, 95-7, 102-11, 172-4, 236; Law Commissions, 55, 167-74, 176, 221-2, 234, 236; legislative measures, 151, 178, 181, 183, 192-3, 196-7, 201-3, 209, 234, 236, 238-9, 241, 258, 260-1, 266-7, 273, 275, 278-9, 290, 294, 297, 303, 310-17; legislative procedure, 117-18, 121, 124; European settlement, 29-32, 64; racial discrimination, 66
- Courts of law—
- Crown Courts, 11, 197-202, 227, 231, 279-83, 291; Supreme Courts, 5-9, 12-13, 16, 24-31, 47, 96, 129, 198-201, 255-6, 260, 278-80, 285 & *passim*; Recorder's Courts, 8, 201-2, 209, 234, 279, 282; Mayor's Courts, 1-2, 6, Courts of Request, 179, 198-201, 231, 239, 280, 282; Military Courts of Request, 22; Small Causes Courts, 22, 124, 132, 280; Magistracy, 197-8, 255, 280; Justices of the Peace, 188, 197-8, 277-8, 280; Coroners, 280; proposal for establishing Subordinate Civil and Criminal Courts, 195, 197-201, 209, 227, 236-7, 279-80
- Company Courts, 177, 195, 202-7, 231, 283-6, 288-91; Sadr Courts, 21, 24, 203-5, 267-8, 274-5, 283-4, 289; Provincial Courts, 9-10, 179, 203, 283; District & Sessions Judge, 283; Magistracy outside Presidency towns, 274, 284; Amins, Munsiffs, etc., 128, 203, 283-6; judicial functions of the Governor General and Governor and their Councils, 9, 13
- Amalgamation of the Supreme and the Sadr Courts, 7, 47-8, 195, 198-201, 225, 278-9, 288
- High Courts, 225, 279, 288
- Legal profession and training, 203, 291
- Cowell, Herbert, 3, 6, 8, 10, 13
- Criminal procedure 19, 60-1, 160, 163, 205, 289; also Codes
- Crown, 3, 5, 7, 9-10, 16-17, 49-50, 60, 94, 245-6, 279
- Cultural & humanitarian reforms, 310-17
- Cumming, Sir J., 66, 77
- Cumpstone, I. C., 303
- Currie, E., 317
- Currie, F., 105-6, 189, 258
- Curry, J. C., 273
- Curzon, Lord, 333
- Customs, 150, 162, 232, 293-5, 307, 328; also Transit duties
- Cuttock, 64
- Dalhousie, Earl of (Commander in Chief), 43

- Dalhousie, Marquis of (Governor General), 57, 69, 169, 189, 217, 296, 300-1, 311, 315; Charter Bill, 70, 73-4, 80-1, 83-4, 88; Fourth Member, 73, 105-8, 111; Legislative Council, 137, 150, 152-3, 156, 185-6, 221-2, 224, 268, 311, 315; executive-legislative relationship, 124, 134-5, 146; power of Court of Directors, 137, 236, 241-2
- Decentralisation Commission, 328, 333
- Decrees & summons, see Execution
- Delhi, 42
- Derby, Lord, 69
- Derozio, 76
- Dharkar, C. D., 9, 318
- Dharna*, 316
- Dhaturias* (professional poisoners), 275
- Dickinson, John, 70
- Divani* territories, 3-5, 11
- Dodwell, H. H., 65-6
- Dorin, J. A., 148
- Dundas, Henry, 29
- East India Company, *passim*; trade, 27, 29, 39, 41; also Charters
- East, Sir Edward, 16
- Economic life, laws relating to, 292-305
- Edmonstone, N. B., 15, 31, 44, 55
- Edwards, William, 71
- Elizabeth, Queen, 1
- Ellenborough, Lord, 28, 60, 209, 218, 303, 323; Charter Bills, 41, 46, 56, 60, 69-70, 74, 79, 81-3, 90, 92-3; Fourth Member, 101-4, 110-11; codification & Law Commission, 56, 183, 201-2, 213, 215-16, 220-1, 225; conflict with Council, 113-15; conflict with Court of Directors, 103-4, 110-11, 227, 236
- Elliott, D., 149, 169, 171, 184, 186, 221, 224
- Ellis, T. F., 223
- Elphinstone, Lord, Governor of Madras, 71
- Elphinstone, Mountstuart, 29, 31, 34-5, 38, 55, 211; also Codes
- Emigration, see Colonies
- England, see Britain
- English law in India, 2, 4, 6, 16, 18, 22, 30, 32, 55, 60, 211, 227, 281-3; also *Lex Loc*
- English Law Commissions, 36-7, 108, 184, 210
- Equity, 282-3
- Erskine, C. J., 143
- European British subjects, 16, 26, 65-7, 69, 231, 234, 244, 265, 278, 325; settlement of, 29-33, 40, 62, 64, 123, 231, 285, 295-7; jurisdiction of the Crown & Company Courts over, 4, 7, 9, 18, 29-32, 47, 62, 112-13, 177-8, 187-90, 200, 209, 231-3, 284-6, 296, 304-5, 308; protection of Indians against oppression by, 31, 65-7, 177, 296; representation on the Law Commission & the Legislature, 49, 53-4, 75, 78, 168, 324-5, 329-30; in trade & industry, 29-31, 33, 69, 168, 296-8, 304-5
- Europeans, 26, 231, 244, 278, 284-5, 304-5, 308
- Evangelicals, 33, 35-6, 108, 310
- Evidence, laws re., 190, 205-6, 248, 282, 289-90, 317
- Excise, see *Abkary*
- Execution of decrees & service of summons, 23, 205-6, 282, 288, 290-1
- Extra-territorial crimes on land & sea, 230, 260-5
- Factors Acts, 300
- Fatwa*, 205, 275
- Fawcett, Charles, 2
- Fines, escheats, etc., Crown's prerogatives re., 89, 230, 255-6



- Forbes, H., 141, 143, 150, 161, 248-9  
 Forrest, G. W., 7, 20  
 Fortesque, Thomas, 53, 55  
 Fourth Member, 72-3, 234; creation of & appointments to the office, 31, 51-2, 56-7, 88, 94-7, 101, 107-10; relation with non-Legislative Departments, 56-7, 97-107, 110, 132-4, 236; proposal to abolish office, 101-3, 110-11, 236; under 1853 Charter, 82-4  
 Franks, Sir J., 48  
 French colonies, see Colonies  
 Frere, Sir H.B.E., 84, 135-6, 139, 142-3, 145-6, 150, 156, 159, 165, 311, 321, 323-6, 329  
 Gambling, law re., 316  
 Ganjam, 232, 271-2  
 Gaya, 311  
 Ghose, Ram Gopal, 77-8  
 Ghulam Muhammad Ghaus, 246  
 Gladstone, W.E., 329  
 Goode, S.W., 277  
 Governors, *passim*; separation from Council, 237  
 Governor General, 82, 120, 137, 141, 164 & *passim*; enactment of laws, 14, 50, 57-9, 88, 94, 113, 251, 327-8; relations with Council, 14-15, 112-16, 133-4, 137, 150-1  
 Governor General & Council, 29, 52, 64-5, 82 & *passim*; need for a law member, 83-4; also Fourth Member, Non-Regulation areas  
 Granada, 303  
 Grant, Charles, 15, 24-5, 32, 37, 41, 44-5, 52, 55, 61, 64, 67, 108  
 Grant, Charles (elder), 33  
 Grant, Sir J. P., 137-9, 149, 154, 156, 160, 170, 207, 292, 313, 321  
 Granville, Earl, 69-70  
 Grey & Ripon, Earl de, 323  
 Grey, Lord, 37  
 Grey, Sir C. E., 13, 48-9, 51, 59, 177  
 Grey, W., 15  
 Gupta, Atulchandra, 78  
 Halevy, Elic, 37-8, 108, 169  
 Hamilton, C. J., 293  
 Harbour duties, 232, 301  
 Hardinge Lord, 69, 73-4, 83, 96, 115, 183, 196, 227, 236, 242, 271, 315  
 Hare, David, 76  
 Harrington, H. B., 140-1, 149, 224  
 Hastings, Warren, 3, 6-7, 10, 20-1, 47  
 Hastings, Lord, 284  
 Hawkins, 223  
 Hereditary officers, law re., 128  
 Hill, David, 42-3, 53, 74, 80, 83, 154, 217-18, 233  
 Hindus, 19-20, 205, 287-8, 312-13; also Codes  
 Hobhouse, Sir John (later Lord Broughton) 69-70, 93, 108, 174, 185, 192, 268  
 Holdsworth, W., 37, 300  
 Human sacrifice, 274, 286, 312, 318  
 Hume, James, 82, 90  
 Hume, Joseph, 70, 74  
 Huskisson, 295  
 Ilbert, Courtenay, 1, 9, 37, 181, 210, 260, 265, 268  
 Imlah, A. H., 101, 104, 209  
 Impey, Sir E., 6, 21  
 Income-tax, 149-50, 161, 164, 259, 309, 322-4  
 India Reform Society, 70  
 Indian Councils Act (1861), see Acts (British Parliament)  
 Indian Councils Act (1892), 258, 330  
 Indian Currency Act, 292, 297  
 Indian High Courts Act (1861), 225, 279  
 Indian Law Commission  
 First, 101, 129, 250, 260, 262, 282, 291, 319; constitution & membership, 52, 55-6, 63, 167-71, 221-2; presidentship, 108, 171-4, 222-3; activities, 85, 174-219, 234, 279,

- 309, 313; abolition, 219-22; relation with Legislature, 85, 210-19  
 Second, 82, 85-8, 169, 222-5, 241, 243, 248, 285-8, 319  
 Third, 87, 169, 225, 288  
 Indian Succession Act, 225, 288  
 Indians, employment of, 34, 65-7, 77, 80, 283-4; representation in Legislature, 49, 53-4, 75-82, 326, 328-30  
 Indian States, 2, 14, 17, 230, 261-5, 276, 294-5  
 Indigo, cultivation of & laws re., 30, 175, 249-50, 286, 296, 304-5, 318  
 Indore, 42  
 Infanticide, 274, 286, 312, 318  
 Inheritance & succession, 6-8, 16, 18-19, 225, 281-2, 287-8, 312-13  
 Insolvency, 231, 267, 283  
 Irrigation, cess, 129, 302; works, 129, 160, 163
- Jackson, Sir C. R. M., 139-45, 243, 252, 257-8, 316  
 Jagannath, 311  
 Jamaica, 303  
 Jejeebhoy, Sir Jemsetjee, 257  
 Jenkins, Richard, 45  
 Jervis, Sir John, 223-5  
 Jews, 21  
 Jocelyn, Viscount, 82  
 Johnstone, Sir A., 53, 55  
 Joint stock companies, see Banks  
 Judicial procedure, see Appeals, Evidence, Civil procedure, Criminal procedure, Execution, Jury system  
 Judiciary, separation from executive, 13, 34-5, 306-7; also Courts of law  
 Jury system, 189, 197
- Karaka, D.F., 287  
 Karnul, 270  
 Kaye, J.W., 182-3, 209, 213, 221, 276  
 Keith, A.B., 1, 8, 10, 59
- Khandesh, 271  
 Khonds, 312  
 Khorda Raja, 311  
 King in Council, see Crown  
 Krishna Chetty, Kotah, 159
- Labour welfare, 302-5  
 Laing, Samuel, 84, 143, 244, 323-5, 327  
 Land revenue administration, 21, 163, 165, 206, 296, 306-7  
 Lansdowne, Lord, 41, 46, 55-6, 67  
 Law & order, 162, 271-7, 286  
 Law Commissions, see Indian Law Commission, English Law Commissions  
 Law Department, 96  
 Law Member, see Fourth Member  
 Law, Sir A., 103  
 Lee-warner, Sir William, 69-70, 73-4, 81, 83, 88, 107-8, 135, 137, 169, 241-2, 296
- Legal system, at the time of British conquest, 18-25; general legal reforms, 281-3, 286-91; also Codes, Law Commissions  
 Le Geyt, P.W., 138, 165
- Legislation, general administration, 270-8; administration of justice & legal reforms, 278-91; economic life, 292-305; taxation & revenue administration, 305-9; social welfare, 310-17; general assessment, 317-22; conformity with the laws of England, 1-2, 47, 60-1; influence of English law, 205, 281-3, 287, 298-300, 317, 319; also Indian Law Commission  
 Legislative Department, 96-7, 105, 174, 222  
 Legislative Member, see Fourth Member  
 Legislative system  
 Source of legislative authority, 1-2, 8, 10-11, 16-17, 60  
 Ambit of legislative authority, 1-17,

- 47, 59-61, 63-8, 89-90, 94-6, 239, 251-71
- Legislative machinery, pre-1833—  
7, 12-14, 47; Charter of 1833—  
27, 32, 40, 42, 46-57, 59, 61, 74,  
81, 110-11, 220; Charter of 1853—  
71-83, 147, 321; post-1861 — 146,  
322-32
- Provincial Legislatures, 14-15, 28,  
41-6, 59, 71-2, 323-4, 326-8
- Legislative procedure, pre-1833—  
5, 9-10, 12-16, 27, 32, 47, 50, 61-  
2, 96-7, 110, 174; Charter of  
1833 — 61-3, 117-27; Charter of  
1853 — 90-3, 137-9, 144, 148-65,  
324; Act of 1861 — 320-2
- Legislative-Executive relations,  
Charter of 1833 — 94-7, 109, 132-  
4, 259; Charter of 1853 — 133-47,  
158-62, 165, 250-1, 322-3; post-  
1861 — 330-1
- Sadr Courts & legislation, 116-17,  
125, 127, 176
- Supreme Courts & legislation, 12,  
27, 46-51, 60, 125, 206-7, 226, 232,  
234
- Local Governments & Central legis-  
lation, 42, 49-51, 74, 81-3, 100,  
125-33, 138, 148-9, 161-2, 165,  
220, 318-19
- Letters Patent, 256
- Lex Loci* for India, 6, 18, 76-7, 113,  
125, 179, 194-7, 209, 224-5, 231,  
239, 279, 282, 287, 314
- Leydon, Lord, 93
- Liberals & Whigs, see Whigs
- Lieutenant Governors, 42, 45, 68
- Littler, Maj. Gen. J.H., 105, 189
- Local Governments, see Centralisa-  
tion, Legislative system & *passim*
- Local self-government, 1, 129, 150-1,  
277-8, 317
- Lowe, Robert, 223-4
- Lewis, J., 189, 258
- Lushington, C., 31
- Lyall, Edward, 254
- Macaulay, T.B., 31, 37, 66, 76, 108,  
118, 152, 220, 235, 240, 274;  
Charter Bills, 41, 55-6, 69, 80;  
office of the Fourth Member,  
94-6, 99-101, 114, 135; codifica-  
tion and law reform, 22, 24-5,  
167-9, 172-4, 177-82, 186-7, 198,  
208, 212-14, 223, 233, 318
- Mackenzie, Holt, 13-14, 23, 31, 37-  
8, 42-3, 53, 55, 58, 117, 211
- Macleod, J.M., 169, 180, 217, 223
- Macnaughten, W.H., 171
- Maddock, Sir T.H., 71, 82-3, 90, 96,  
102-3, 111, 179, 184, 196-7, 215,  
217, 220, 315
- Madras Government, 105, 122, 127-  
31, 165, 323 & *passim*
- Madras Native Association, 71, 74,  
78
- Mahalkaris, 273
- Maine, Sir Henry, 238, 250, 254,  
259-60, 299
- Majumdar, J.K., 30, 55
- Malabar Revolt, 162, 272, 286
- Malacca, 64
- Malcolm, Sir John, 31, 34-5, 52-5,  
211, 289
- Marriage & divorce, 287 8, 312-16,  
318
- Martaban, 293
- Martineau, John, 135-6, 139, 142,  
144, 150, 156, 324, 326, 329
- Mauritius, 302-4
- Mayo, Lord, 333
- Melville, W.L., 53
- Meriah sacrifices, 312
- Metcalf, Lord Charles, 13, 28, 35,  
38, 42-3, 120, 276-7
- Methodists, 33
- Mill, James, 14-15, 31, 37-8, 44, 53-  
6, 59, 66, 75, 126, 169, 179, 219,  
223
- Mill, John Stuart, 80, 83, 233
- Millett, Frederic, 74-5, 80, 83, 85-6,  
96, 154, 169-71, 183-4, 217, 222-3;  
draft code on civil procedure by,

- 169, 176-8, 224  
 Mills, A.J.M., 224  
 Missionaries, 26, 69, 239, 310, 313-15  
 Mitter, Raj Jogeshur, 77  
 Montagu-Chelmsford Reforms, 330, 333  
 Mookerjee, Hurrish Chunder, 77, 329  
 Morley-Minto Reforms, 330  
 Morley, W.H., 198, 285  
 Morrison, Lt. Col. W., 131-2  
 Mughal Government, 2-4, 8, 10, 17  
 Muhammadans, 205, 287-8; laws of, 19-20, 188, 204-5, 275; also Codes  
 Munro, Sir Thomas, 34-5, 211  
 Murshidabad, Nawab of, 8-9  
 Mutiny & desertion, laws re., 61, 266-7, 271-2  
 Mutiny of 1857, see Revolt of 1857  
 Mysore grant, 160, 243, 322
- Naturalisation & denization, 230, 256-7  
 Navigation laws, 231-2, 293-5  
 Navy, 68, 237, 271, 328  
 Nilgiris, 144-5, 294  
 Non-Regulation areas, 259-60, 270-1, 288, 323  
 North, Lord, 18  
 North-Western Province, 44, 68, 78, 144, 149, 224, 272, 307
- Oaths & affirmations, 205, 248  
 Obscene literature, law re., 317  
 O'Malley, L.S.S., 67, 296, 320  
 Ootacamund Proceedings, legality of, 239  
 Opium, 127-8, 308
- Palmerston, Viscount, 69  
 Panchayats, 127, 287  
 Parliament, 59-61, 232, 251-69, 333, & *passim*; representation of India in, 81; Charter discussions, 39-41, 68-70; also Acts (British Parli-  
 ment)  
 Parsis, 20-1, 23, 26, 194-5, 257, 287-8  
 Passport regulations, 272  
 Patents, 89, 230, 230, 245, 252-3, 296, 299, 318, 328  
 Paternalists, 34-9  
 Peacock, Sir Barnes, 217, 295, 300, 304; Fourth Member, 73, 102, 105, 108-9; Legislative Council, 93, 148, 152, 154, 156; Legislature vs. Executive, 138-44, 323; scope of legislative authority, 252, 255, 257-9, 263; Court of Directors, 244, 246; Penal Code, 186-7  
 Peel, Sir Lawrence, 148, 152, 196, 228  
 Peel, Sir Robert, 221, 273  
 Pegu, 293  
 Penal Code, see Codes  
 Penal law reforms, 286-7  
 Perry, Sir Erskine, 71, 85, 125, 132, 169-70, 225, 228, 281  
 Philips, C.H., 28, 41  
 Pilgrim tax, 311  
 Plassey, battle of, 3  
 Police, 273-4, 317, 324  
 Political consciousness, 26, 75-81, 158, 325-6, 328-9; also Press, Public opinion, Public organisations  
 Pollock, Sir George, 124  
 Port duties, 232  
 Portfolio system, 73  
 Ports & lighthouses, 301  
 Portuguese, 287  
 Post & telegraph, 301, 328  
 Prasad, Bisheshwar, 132, 328, 333  
 Prerogatives, 89-90, 230-2, 245, 252-8, 285, 296-9, 318, 328  
 Prescription & limitation, 206, 209, 288, 317  
 Presidency towns, 16-17, 273-4, 308 & *passim*; municipal administration, 277-8; laws re., 197-8, 201, 279-80, 287-8; also Crown Courts under Courts of law

- President & Council, 114, 120  
 Press, 26, 69, 76-7, 325; regulation of, 226, 235, 276-7; reporting of legislative proceedings, 155-7, 162  
 Princes, see Indian States  
 Prinsep C.R., 254  
 Prinsep, H.T., 80, 99-102, 118-19, 121, 176-7, 179, 195, 214  
 Prisons, 145, 243-4, 272, 274, 276, 323  
 Privy Council, 4, 13, 16, 127, 231, 257, 289  
 Provincial Legislatures, see Legislative system  
 Provincial Courts & Councils, 9-10  
 Public opinion, in India 26, 133, 324-6; in England, 28, 190, 209, 232, 234; also Political consciousness  
 Public or constitutional rights, 19, 24, 212  
 Public organisations, 71, 74-8, 90, 122, 155-6, 158, 160, 325  
 Public works, 300-2  
 Racial discrimination, 65-7, 285-6; also European British subjects  
 Railways, 300-1  
 Ram Gopal Ghose, 69  
 Ram Mohan Roy, Raja, 26, 30, 39, 54-5, 61  
 Rankin, G.C., 6, 8, 18, 21, 23, 108, 169, 209, 218, 282, 290, 319  
 Registration, literary societies, 317; deeds & conveyances 238, 299  
 Regulating Act (1773), see Acts (British Parliament)  
 Regulations (Bengal), 1793—XX, 14, 116; XLI, 116; 1795—XXIX, 14; 1805—II, 288; 1810—XIX, 311; 1811—X, 190; 1827—IV, 285; 1829—I, 283; 1831—V, 283, 285; VII, 283; VIII, 307; 1832—III, 190; VII, 314; 1834—II, 235  
 Regulations (Bombay), 1799—III, 15; 1803—I, 15; 1805—II, 15; 1808—II, 11, 15; 1812—II, 117; 1827—I, 14, 117; IV, 21; XXI, 308; 1830—XVI, 312; XX, 15; 1831—XVIII, 284; 1832—VI, 20  
 Regulations (Madras), 1802—I, 117; 1817—VII, 311; 1820—I, 308; 1833—III, 284  
 Religion & religious institutions, 76, 150-1, 232, 234, 239, 310-12, 328  
 Reunion, 303  
 Revenue administration, 163, 305-9  
 Revolt of 1857, 139, 143, 146, 162, 235, 272, 277, 286, 296, 310, 324-5, 329  
 Ricketts, H., 139  
 Ripon, Lord, 103  
 Robertson, T.C., 219  
 Roe, Sir Thomas, 2  
 Romilly, Sir John, 223  
 Ross, Alexander, 38, 53, 109, 120, 168, 170, 172-3, 211, 293  
 Rum & rumshrub, 295  
 Russell, Lord, 68  
 Ryan, Sir Edward, 16, 27, 38, 47-8, 51, 59, 74, 81, 85-6, 177-8, 180, 186, 223  
 Salt tax, 130, 234, 307-8  
 Samru, Begam, 270  
 Santal rebellion, 162, 286  
 Sati, 274, 312  
 Sconce, A., 141, 143, 159, 244  
 Secretary of State for India, 142-6, 242-51, 330-3  
 Selborne, Lord, 268  
 Sen Gupta, Ners Chandra, 329  
 Seton, Sir H.W., 196, 281  
 Shakespeare, 172  
 Sherbrooke, 223  
 Shipping & navigation, 63, 123, 127, 231-2, 293-5  
 Shirrass, F., 297  
 Shore, F.J., 31  
 Shore, Sir John, 33  
 Sind, 273  
 Singapore, 64, 232

- Slavery, 40, 62, 67-8, 76-7, 113, 175, 179, 190-4, 209, 231, 233-4, 286, 302, 312, 318
- Smith, Vernon, 225, 242-3
- Stamps & stamp duties, 137, 160, 163, 207-8, 308-9, 317
- Stanley, Lord, 69, 82, 303
- State prisoners, 272
- Stephen, Leslie, 108
- Stephen, Sir James Fitzjames, 182, 187, 286
- St. Kitts, 303
- St. Lucia, 303
- Strachey, Edward, 38
- Strachey, Sir John, 187
- Stokes, Eric, 33, 36-8, 51, 54, 66, 85, 108-9, 126, 177-9, 182, 203, 211-13, 217, 223, 274, 319
- Stokes, Whitley, 181, 203, 206, 254, 286, 288, 290
- Straits Settlements, 112, 128, 201-2, 209, 234, 264, 274, 277-80, 286, 292, 308, 316
- Sugar tariff, 295
- Sullivan, John, 31, 44, 53, 59, 71, 85, 132
- Supervisors (Bengal), 3
- Surat, 130
- Sutherland, J.C.C., 170
- Tagore, Debendranath, 76
- Tagore, Dwarkanath, 30
- Tagore, Prosonno Coomar, 77
- Tatva-Bodhini Sabha, 76
- Taxation, powers, 11, 17, 21, 62-3; legislative procedure, 123, 153, 162-3; Local Governments, 123, 127-32, 149-50; Legislative-Executive relationship, 94-5, 137, 140-3; other matters, 160-2, 207-8, 232, 234, 293-6, 306-11, 322-4
- Tea, see Assam Company
- Tenancy legislation, 306-7
- Tennaserim, 293
- Thali Ghat, 130
- Thompson, E., 28, 38, 277
- Thompson, George, 77
- Thornton, E., 40
- Thugi & dacoity, 239, 261-4, 274-6, 286
- Tinker, Hugh, 278
- Tipu Sultan, sons of, 142, 159, 243, 250
- Tolls, 128, 130
- Tories, 29
- Torts, law of, 19
- Town duties, 318
- Trade, commerce & industry, 29-31, 33, 69, 168, 293-300, 304-5, 318
- Trades & professions, tax on, 137, 140, 149, 164, 309-10, 322
- Transit duties, 318
- Transportation of prisoners, 231, 239, 272
- Trevelyan, G.O., 181
- Trevelyan, Sir Charles, 71, 85-6, 142, 161, 324
- Trinidad, 303
- Tripathi, Amles, 27
- Trotter, L.J., 189
- Tucker, Henry St. George, 45, 182-3, 221
- Turton, Sir T., 268
- Twenty-four Parganas, 291
- Universities, 165, 317
- Usury laws, 300
- Utilitarians, see Bentham
- Victoria, Queen, 281
- Vidyasagar, Iswar Chandra, 313
- Villiers, Hyde, 37
- Vizagapatam, 232, 271-2
- Wellington, Duke of, 41, 46, 55
- Wells, Sir Mordaunt, 142
- Wesley, 33
- West, Algerton, 250
- West, Sir Edward, 48
- Whigs, 29, 34-9, 108, 211
- Whitefield, 33
- Willoughby, J.P., 71, 131-2

- Willoughby, J.P., 71, 131-2  
Wills & probates, 281-2  
Wilson, James 84, 139, 142, 149  
Wood, Sir Charles, 70-1, 73-4, 81-4,  
86, 89-91, 135, 144, 146, 150, 156,  
160, 248-50, 323-6, 329, 331  
Wortley, J.S., 314  
Wright, Lord, 319  
Wynne, Charles W.W., 41, 46  
Young, G.M., 35  
Young, James, 38, 170-1  
Zamindaris, 306  
Zamindary Association, 77